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No. 95-358

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

GENE E. RICE, et al.,
Petitioner,

v.

THE RESOLUTION TRUST CORPORATION, et al.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Ninth Circuit's decision, affirming the district court's order barring indemnity and contribution claims against a non-party to the action, an unwarranted extension of judicial power?

2. Does the Ninth Circuit's decision affirming the district court's approval of a partial settlement impose a penalty against nonsettling defendants without due process of law and in violation of federal statute?

3. Does the Ninth Circuit's decision conflict with this Court's decision in *O'Melveny & Meyers v. FDIC*, 114 U.S. 2048, 129 L.Ed.2d 67 (1994), because the Ninth Circuit disregarded Arizona law of indemnity in the context of state law claims against the nonsettling defendants by the Resolution Trust Corporation?

LIST OF PARTIES

The parties to the proceedings below were Defendants/Petitioners Gene E. Rice, Lola Rice, Ernest F. Modzelewski and Nancy Modzelewski ("Nonsettling Defendants") and Plaintiff/Respondent Resolution Trust Corporation ("RTC") in its corporate capacity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Gene E. Rice, Lola Rice, Ernest F. Modzelewski and Nancy Modzelewski respectfully request that this Court issue a writ of certiorari reviewing the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on June 5, 1995.

OPINIONS BELOW

The United States District Court for the District of Arizona issued an Order, dated January 7, 1994, containing findings of fact and conclusions of law, included as Appendix "A", *infra*.

The March 23, 1995, Opinion of the United States Court of Appeals for the Ninth Circuit, affirming the district court's Order, is reported at 51 F.3d 194, and included as Appendix "B", *infra*.

The June 5, 1995, Order of the United States Court of Appeals for the Ninth Circuit, denying petitioners' petition for rehearing, has not been reported. A copy of the Order is included as Appendix "C", *infra*.

JURISDICTION

Petitioners Gene Rice, Lola Rice, Ernest Modzelewski and Nancy Modzelewski challenge the district court's approval of the partial settlement of a Resolution Trust Corporation ("RTC") lawsuit ("the RTC action") against former directors and officers of MeraBank, a failed federal savings bank. As the district court found, the partial settlement of the RTC action was inextricable from (and consolidated with) the settlement of three other related actions (collectively referred to as the "consolidated actions") (Appellant's Excerpts of Record (hereinafter "R.") at 721, 1703.) Therefore, the appeal below sought reversal of the judgments dismissing each of the following actions: Resolution Trust Corporation v. Rice, et al., CIV 91-0634 PHX PAR; Stepack, et al., v. Turley, et al., CIV 89-2061 PHX PAR; Persky et al., v. Turley, et al., CIV 88-1830 PHX PAR; and Gould, et al., v. Turley, et al., CIV 88-2089 PHX PAR.

Subject matter jurisdiction is asserted (i) pursuant to 28 U.S.C. Sections 1331(a) and 1345, and 12 U.S.C. Section 1441(a)(1)), in RTC v. Rice; (ii) pursuant to 28 U.S.C. Sections 1331 and 1332 in Stepack v. Turley; and (iii) pursuant to Section 22 of the Securities Act of 1933 ("Securities Act") and Section 27 of the Securities Exchange Act of 1934 ("Exchange Act") in Persky v. Turley.

Judgments were appealed to the United States Court of Appeals for the Ninth Circuit pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The judgments appealed from were entered on or about December 30, 1993; the notice of appeal was filed on January 31, 1994, and was timely pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

The Ninth Circuit affirmed the District Court of Arizona in a March 23, 1995, opinion. Petitioners then petitioned the Ninth Circuit for a rehearing. On June 5, 1995, the Ninth Circuit denied petitioners' petition for a rehearing. The Court has jurisdiction to review the Ninth Circuit's judgment under 28 U.S.C. section 1254.

STATEMENT OF THE CASE

From 1954 until February 1990, Gene Rice was employed by MeraBank, a federal savings bank. (R. at 766.)[1] Mr. Rice devoted over thirty-five (35) years to serving MeraBank, including twenty-eight (28) years as a director and officer. During his tenure as an officer and director, Mr. Rice served as MeraBank's Chairman and Chief Executive Officer for eight (8) years. From 1961 until February 1990, Ernest Modzelewski devoted over twenty-eight (28) years to serving MeraBank, including 17 years as an officer and eight years as director. (R. at 775.) To retain Mr. Rice and Mr. Modzelewski as well as recognize their years of devoted service to MeraBank, MeraBank provided Mr. Rice and Mr. Modzelewski with salary continuation agreements providing pension benefits. As of February 1990, Mr. Rice's pension benefits were $4,210,880; Mr. Modzelewski's were approximately $2 million. (R. at 744, 775.)

In December 1986, AZP Group, Inc., which later became Pinnacle West Capital Corporation ("Pinnacle West"), acquired MeraBank. As a condition of Pinnacle West's acquisition, the Federal Home Loan Bank Board required Pinnacle West to enter a "keep well agreement" obligating

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[1]MeraBank has also previously been known as First Federal Savings Bank of Arizona and First Federal Savings and Loan Association. (EOR,766.)

Pinnacle West to maintain minimum levels of capital at MeraBank. (R. at 795-96.) In December 1989, however, Pinnacle West secretly entered into an agreement with the Office of Thrift Supervision ("OTS") wherein Pinnacle West agreed to pay $465.5 million to MeraBank for a release from the "keep well agreement." ("1989 Pinnacle West OTS Agreement"). (R. at 1611-21.) Almost immediately after Pinnacle West was released from the "keep well agreement," the government seized MeraBank and repudiated Mr. Rice and Mr. Modzelewski's pension benefits. (R. at 769.)

The Persky and Gould class actions were filed in late 1988, eventually were consolidated and involved classes of persons who purchased Pinnacle West's common stock. (R. at 365-66.) The Stepack action was filed as a derivative action in late 1989, and alleged claims for negligence, breach of fiduciary duty and Securities Act violations in connection with Pinnacle West's acquisition of MeraBank in December 1986. (R. at 367-369.)[2] Following orders on motions to dismiss, the consolidated class actions consisted of claims for negligent misrepresentation and violations of the Securities Act, the Exchange Act and the Arizona Sale of Securities Act in connection with defendants'

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[2]Mr. Rice was a defendant in all the actions. Pinnacle West was a defendant in the consolidated Perskey and Gould class actions, and a nominal defendant in the Stepak action. Mr. Modzelewski was not a defendant in any of the actions.

purported misrepresentations about Pinnacle West. (Id.) The parties conducted substantial discovery in the class and derivative actions. (R. at 367,369.)

The RTC action was filed in April 1991, alleging claims for negligence, gross negligence, negligence per se, breach of fiduciary duty and breach of contract against 20 former MeraBank directors and officers, including Mr. Rice and Mr. Modzelewski. (R. at 372.) Although Pinnacle West was not named as a defendant, the RTC consistently has maintained that it had claims for compensatory damages against Pinnacle Wes. Nevertheless, the RTC and Pinnacle West entered into a tolling agreement suspending the running of the statute of limitations. (R. at 372,1704,1711.) These two actions settled before Pinnacle West became a defendant in the RTC action. (R. at 171.)

Defendants filed motions to dismiss the RTC action in July 1991, and after hearing oral argument in September 1991, the district court stayed the action pending settlement proceedings. (R. at 373.) No discovery was conducted in the RTC action prior to the disputed settlement.

By a district court order dated January 30, 1992, the Honorable Pamela Ann Rymer, United States Court of Appeals Judge, was appointed Settlement Judge. (See R. at 1698.) During the ensuing court supervised settlement negotiations, the RTC told Mr. Rice and Mr. Modzelewski (the "nonsettling RTC

defendants") that if they wanted to settle the RTC action, they would have to completely forfeit their pension benefit claims ("compensation claims").

In order to further the settlement, the excess insurers for all the defendants, including Mr. Rice and Mr. Modzelewski, offered to pay Mr. Rice and Mr. Modzelewski's compensation claims above and beyond the amount paid out in the settlement. However, the district court found that "[t]he RTC was unwilling to accept settlement on these terms." (R. at 1705 ¶ 15.) No legitimate governmental interest has ever been offered to explain the RTC's conduct.

The RTC's agenda was to require the nonsettling RTC defendants to give up far more than the other similarly situated settling defendants. Six other defendants also asserted compensation claims in the aggregate amount of $1.914 million against the RTC for wrongful repudiation of their respective directors' fees (identified in the Stipulation as "compensation claims"). These settling defendants compromised their lesser claims as a condition of settlement.[3] (R. at 1703.) The

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[3] The settling defendants' respective compensation claims were substantially less valuable individually, as follows: Peter C. Byrne $217,500 (EOR,654-58); Reginald T. Morrison, $180,00 (Id.,662-66); Donald S. Johnson, $225,000 (Id.,670-74); Howard E. Kraft, $391,500 (Id.,649-53); Hayden C. Hayden, $652,500 (Id.,678-82); and Melvin Decker, $247,500 (Id.,694-98).

practical effect, however, was that the RTC's settlement terms disparately prejudiced the nonsettling RTC defendants because no other settling defendant had claims remotely approaching the value of the nonsettling RTC defendants' compensation claims nor did they have any entity offering to fund payment of their claims in addition funding the settlement of this action.

The RTC's refusal to allow the excess insurers to pay the non-settling defendants' compensation claims places the Nonsettling RTC defendants and their insurers in an even more adverse relationship. The district court noted below that

> both the RTC and Nonsettling RTC defendants maintain that substantial coverage exists with respect to the RTC claims; the insurers, of course disagree.

(R. at 1705 ¶ 16.) The RTC's only response to this heightened conflict between the Nonsettling RTC defendants and their insurers was:

> the possible exhaustion of defense coverage limits under applicable insurance policies is a risk inherent in litigation against which the Non-Settling RTC Defendants cannot reasonably expect special protection.

(Dec. 20, 1993, Joint Reply at 10 n.6.)

Just as the nonsettling RTC defendants objected to the RTC's arbitrary repudiation of their compensation rights in

Modzelewski v. RTC, 14 F.3d 1374 (9th Cir. 1994),[4] so too did they object to being singled out and pressured to sacrifice what no one else had to sacrifice in settlement-- a bona fide offer of payment, which cost the RTC and the other settling parties absolutely nothing. The result, however, was that all other parties settled out of the RTC action. More particularly, the settling parties executed a Stipulation of Settlement in November 1993 ("Stipulation") for the dismissal of the consolidated actions, except as to the nonsettling RTC defendants. (R. at 347-637.)

The Stipulation required a motion for entry of findings of fact, conclusions of law, order and final judgment. (R. at 412.) Following written briefing, a joint motion for an order determining the parties' settlement to be in good faith and dismissing all claims against certain parties ("motion for good faith determination") was heard by Judge Rymer on December 29, 1993. The nonsettling RTC defendants opposed the good faith determination on several grounds, including those issues identified herein.

In an unprecedented expansion of judicial power, the district court barred all the nonsettling RTC defendants' contribution and indemnity actions against Pinnacle West, which

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[4]In Modzelewski v. RTC, the Ninth Circuit found that Mr. Rice's pension benefits were vested, but Mr. Modzelewski's were not. 14 F.3d 1374 (9th Cir. 1994).

was not even a defendant in the RTC action, and barred all non statutory or non contractual indemnity claims against the settling defendants who were parties to the RTC action. (R. at 1711.).

As articulated in the district court's January 11, 1994, Order ("Settlement Order") setting forth findings of fact and conclusions of law, the district court found that the Stipulation was non-collusive and was a fair, reasonable and good faith resolution of the RTC action. (R. at 1702, 1708.) The Settlement Order also barred the nonsettling RTC defendants' claims for contribution and indemnity against non-party Pinnacle West. (R. at 1711.) The findings of fact stated that Pinnacle West contributed to the settlement by "funding the premium expense for the various directors' and officers' liability insurance policies," and that Pinnacle West contributed $5.75 million to the settlement.[5] (R. at 1703-04.) The findings of

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[5] As stated in the Affidavit of Katherine C. Harmeyer (EOR,724-25), the Stipulation provided for payment in the aggregate amount of $61.625 million in full settlement of the Class Action and the Derivative Action and in partial settlement of the RTC action. Pinnacle West paid $5.75 million to the Class Settlement Fund. Directors and officers' liability insurance companies paid $55.875 million of the balance of the settlement funds, of which $28.25 million dollars was deposited in the Class Settlement Fund and $27.625 million was deposited in the Derivative Settlement Fund. The Stipulation further provided that the RTC was to receive $25 million of the Derivative Settlement Fund.

fact added, without more, that the district court "considered" the 1990 Pinnacle West OTS Agreement. (R. at 1703.)

Finally, the district court adopted Arizona's proportionate judgment rule as the proper post judgment offset rule. (R. at 1714.) The district court and many of, if not all, the settling parties believed that the settlement of the RTC action was inextricably inter-related with the settlement of the Class action and Derivative action settlements.

The Ninth Circuit affirmed the judgment on March 23, 1995. The court found nothing in the record to indicate that the trial court abused its discretion in finding that the settlement agreement was fair, made in good faith, and did not prejudice the Nonsettling Defendants. On May 7, 1995, Petitioners filed their Petition for Rehearing. On June 5, 1995, the Ninth Circuit denied the Petition for Rehearing. Petitioners now seek a writ of certiorari reviewing the Ninth Circuit's judgment and opinion.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S ORDER BARRING THE NONSETTLING DEFENDANTS' INDEMNITY AND CONTRIBUTION CLAIMS AGAINST A NON-PARTY WAS AN UNWARRANTED EXTENSION OF JUDICIAL POWER; THE NINTH CIRCUIT'S AFFIRMANCE OF THAT ORDER CONFLICTS WITH THE TENTH CIRCUIT.

The District Court was without authority to bar the non-settling defendants' indemnity and contribution claims against Pinnacle West, a non-party, to the RTC action. Despite the well settled principles laid by this Court, the Ninth and Tenth Circuit disagree about this fundamental issue of judicial power. It cannot be disputed that a federal court's jurisdiction is limited and there is a presumption against federal jurisdiction to enforce a settlement agreement.

> Federal courts are courts of limited jurisdiction. They possess only power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co. of America, 114 S.Ct. 1673, 1675, 120 L.Ed.2d 391 (1994) (reversing Ninth Circuit decision that district court had power to enforce settlement agreement between parties to litigation where settlement agreement did not reserve such power to district court) (citations omitted).

> Enforcement of the settlement agreement . . . whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.

Id. at 1675-76.

Where a court shields a non-party from claims by a non-settling defendant, the Court must have a clear basis for jurisdiction. There simply is no such jurisdiction here. Normally, "[c]ontribution bar orders are frequently upheld when they are sought by a settling defendant against a nonsettling defendant in the same case." FDIC v. Geldermann, 975 F.2d 695, 698 (10th Cir. 1992). However, the Court lacks jurisdiction to provide a bar order to a non-party.

In reversing a district court's confirmation of a settlement barring indemnity and contribution claims against non-parties, the Tenth Circuit in Geldermann wrote about the dangers of non-party bar orders:

> However, it is quite another matter when the bar order precludes a nonsettling defendant from maintaining a claim of contribution or indemnity against non-parties. The nonsettling defendant has nothing to win and everything to lose when the Court considers such a bar order. If the Court decides that the nonsettling defendant is entitled to assert a claim of contribution or indemnity against the non-parties, that determination would not bind the non-parties. On the other hand, the bar order precluding the nonsettling defendant from suing the nonparties for indemnification or contribution would bind the nonsettling defendant. Any claims for contribution or indemnity that may be asserted by the [non-settling] defendants in the Instant Action against the Settlors must be adjudicated between--not through the FDIC. Contribution and indemnity claims may involve consideration of may matters, such as personal defenses, compulsory counterclaims, and the like, which could not be asserted by or against the FDIC.

Id. (citation omitted).

Here, despite the non-settling defendants objections to the settlement based upon Pinnacle West, as a non-party, receiving the benefit of a bar order, the district court found that

> Pinnacle West is a critical party to the overall settlement of the consolidated actions. Moreover, Pinnacle West has contributed substantial value to the overall settlement, without which the partial settlement in the RTC Action could not have occurred. Under these circumstances I conclude that the bar order should also apply to any subsequent claims against Pinnacle West.

(Settlement Order, App. A at A34-A35.)

The Ninth Circuit without analysis, without mentioning, and in conflict with Geldermann, adopted the district court's rationale holding:

> The district court did not abuse its discretion in finding nonparty Pinnacle West to be a critical participant and contributor to the overall settlement, and thereby applying the bar order to subsequent non-contractual claims against it.

(Opinion, App. B at B17-B18.)

However, where the government has not even been required to bring Pinnacle West into the litigation and state the

nature of its claims, the settlement process is ripe for abuse. As the Geldermann Court noted:

> It does not take too much imagination to see why the FDIC in the Settlement Agreement desired to negotiate away the [non-settling] Defendants' possible right to claim contribution or indemnity from the Settlors. The FDIC obviously could enhance the attractiveness of the settlement to the Settlors if it were able to bargain away not only its claims against the Settlors, but also the claims that other entities (including entities that are not even part of the Sevier or FIS suits) might have against the Settlors.

Geldermann, 975 F.2d at 698.

All that is required to provide the district court with jurisdiction and the non-settling defendants a real opportunity to challenge the settlement is the RTC filing a claim against Pinnacle West. Rather than even determine the nature of its claims and file against Pinnacle West, the RTC entered a tolling agreement and conducted no discovery. (R. at 1704.) In fact, the RTC even admitted:

> [T]he RTC's claims have not progress beyond an early stage . . . For example, it is too early to determine what claims will ultimately be

> presented to the jury at trial much less the nature of those claims.

(RTC's Dec. 20, 1993 Reply, at 22.)

Finally, the Stipulation provided that Pinnacle West was to contribute $5.75 million to the Class Settlement Fund but nothing to the RTC. (R. at 724.) Thus, the RTC government secretly tried its own claims and the claims of the non-settlors against Pinnacle West and convinced the Court to reach matters not properly before it.

The district court distinguished Geldermann on the ground that the FDIC was not the real party in interest to request the bar order and Rule 17 of the Federal Rules of Civil Procedure prevented the Court from addressing its request. (R. at 697.) In contrast, the district court considered that Pinnacle West was fully involved in seeking a bar order for itself. (See R. at 1711.) However, being involved in settlement discussions with a settlement judge is a far cry from being a named party in the litigation. Non-settling defendants are not aware of any case other than the present action where involvement in settlement discussions, without being a party to a legal action, constituted a basis for federal court jurisdiction.

Finally, the conclusion that the consideration provided by Pinnacle West conferred a substantial benefit on the RTC, justifying the bar order is unsupportable and is not recognized

basis for jurisdiction. (See App. A at A28-A29.)[6] When a nonparty is permitted to participate in settlement, and thereby purchases a bar order protecting itself from ever having to answer to nonsettlors, the jurisdiction of the federal courts is expanded beyond any justifiable limit.

II. THE NINTH CIRCUIT AFFIRMED A PARTIAL SETTLEMENT WHICH IMPOSES A PENALTY AGAINST THE NONSETTLING DEFENDANTS WITHOUT DUE PROCESS OF LAW AND IN VIOLATION OF FIRREA.

The statutory framework of FIRREA (12 U.S.C. 1801 et seq.), in which the RTC is mandated to conduct itself, is far reaching in certain aspects. Nevertheless, basic concepts of due process and constitutionally protected rights were not abolished with FIRREA and necessarily must circumscribe the RTC's reach.

The district court's approval of a settlement barring claims against a non-party, especially when the claims against the non-party are not disclosed violates due process. See Geldermann, 675 F.2d at 698 n.4. ("we note that courts faced with the reverse of our situation have uniformly prohibited

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[6]The District Court did not find that the 1990 Pinnacle West-OTS payment "contributed the settlement" in its findings of fact. (Settlement Order, App. A at A17-A19.)

parties from seeking to preclude the rights of non-parties. See e.g. Martin v. Wilkes, 490 U.S. 755, 768, 109 S.Ct. 2180, 2187 (1989); Hansberry v. Lee, 311 U.S., 32, 41, 61 S.Ct. 115. 118, 85 L.Ed. 22 (1940)"). While the Geldermann court distinguished between the imposition of a detriment on non-parties, and the receipt of a beneficial bar order by a non-party, the due process clause makes no such distinction.

> A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly "settle," voluntarily or otherwise, the conflicting claims of another group of employees who do not join the agreement. . . . "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party . . . without that party's agreement."

Martin 490 U.S. at 768, 109 S.Ct. at 2188, *quoting* Firefighters v. Cleveland, 478 U.S. 501, 529, 106 S.Ct. 3063, 3079 (1986). Thus, it is clear that whether or not the court is bestowing a benefit or imposing a detriment on non-parties, as a matter of due process the court cannot adjudicate the rights of entities whose claims are not before the court.

However, Mr. Rice and Mr. Modzelewski were not deprived of their due process rights solely by a lack of adequate procedure. They were penalized by the RTC. By requiring Mr. Rice to give up his vested right to his $4.2 million pension from

MeraBank, which was confirmed in Modzelewski, -- a wholly separate lawsuit against the RTC -- the RTC secured a penalty against both Mr. Rice and Mr. Modzelewski. By imposing the requirement on Mr. Rice and Mr. Modzelewski that they forfeit their vested rights and not accept payment from their excess insurer in order to participate in the settlement of the RTC action, the RTC in effect, is imposing an extremely severe penalty without ever having made a showing of wrongdoing.

Equally, by imposing the disparate settlement terms, the RTC singled out each of the non-settling RTC defendants for punitive treatment without any showing whatsoever that they were guilty of malfeasance. All that the RTC did is initiate the RTC action, merely alleging mismanagement claims. No discovery was conducted and no evidence of wrongdoing was presented. Yet, even in the utter absence of a showing of wrongdoing, or a likelihood that the RTC will prevail on the merits, the nonsettling RTC defendants were penalized by the Stipulation.

If the RTC wants to impose a penalty on the defendants in the RTC action, or to obtain an injunction or attachment order against them, the Stipulation simply is not the available methods by which it may do so. FIRREA contains very restrictive mechanisms for the issuance of an injunction, an attachment order or the imposition of penalties requiring strict compliance by the RTC with statutory provisions and due

process considerations. See 12 U.S.C. section 1833a (including certain penalty provisions of the Crime Control Act of 1990), 12 U.S.C. section 1818 (suspension, injunction, and penalty provisions) and 12 U.S.C. section 1821 (prejudgment attachment and injunction provisions).[7] See also Manges v. Camp, 474 F.2d 97, 100, n.3 (5th Cir. 1973) (former section 1818 penalty sought, quoting Justice Frankfurter, "Where tangible property is taken, either directly or indirectly, there is no doubt that the opportunity for hearing must exist").

Because the condition requiring Mr. Rice to give up his entitlement to $4.2 million owed by the RTC in order to participate in the Stipulation is unquestionably punitive, the RTC is bound by due process to afford Mr. Rice certain safeguards under sections 1818, 1821 and 1833 before effecting such a penalty. Parker v. Ryan, 760 F. Supp. 1189, 1191 (N.D. Miss. 1991)(OTS required to demonstrate prima facie case before attachment order will issue); 136 Cong. Rec. E3686 (daily ed. Nov. 2, 1990) (Congress intended that the government be required to make a showing of injury prior to obtaining injunctive relief).

Courts have long required strict compliance with due process considerations by the government in carrying out its

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[7] See, eg., section 1818(e) through (l); section 1821(d)(18) and (19); and section 1833a, copies of which are provided in the Addendum hereto.

statutory responsibilities. The Supreme Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493 (1985) considered whether a local school district, in dismissing a school security guard, violated the guard's due process rights to a hearing and opportunity to challenge the evidence against him. The Court ruled that the dismissal without an administrative hearing and the district's dismissal was unconstitutional. The Court stated that

> The constitutional process due in any particular situation cannot be exercised at the choice of the government. The process due is a matter of federal constitutional law, and cannot be diminished by the fact a statute sets forth its own procedures that it deems adequate for determining the preconditions to adverse action.

(470 U.S. at 541.)

Further, where the imposition of severe penalties (such as the forfeiture of property) is attempted by a governmental entity (such as the RTC), all the protections afforded by the Fifth and Sixth Amendments, including notice, confrontation, jury trial, the requirement of proof beyond a reasonable doubt and compulsory process, may be required. United States v. Ward, 448 U.S. 242, 249, 100 S.Ct. 2636, 2641 (1980) (imposition of civil penalty for oil discharge into navigable waters evaluated for severity to determine whether Fifth and

Sixth Amendment protections invoked); United States v. United States Coin and Currency, 401 U.S. 715, 720, 91 S.Ct. 1041, 1044 (1971)(forfeiture of property penalty invokes Constitutional protections of the Fifth Amendment); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167, 83 S.Ct. 554, 567 (1963)(penalty of forfeiture of citizenship requires Fifth and Sixth Amendment protections); Villa, John K., Bank Directors' Officers' and Lawyers' Civil Liabilities 1-105 (1992).

As a matter of law, the district court was required to disapprove the Stipulation on constitutional grounds because the RTC's imposition of the compensation claim waiver condition on the nonsettling RTC defendants constituted a penalty assessed without due process of law. The imposition of the disparate settlement terms by the RTC, as approved by the district court and affirmed by the Ninth Circuit, was without any evidentiary showing by the RTC that the nonsettling RTC defendants had engaged in any wrongdoing and without any finding that they were subject to the penalty of having to waive valid compensation rights adjudicated in a wholly separate lawsuit. For these reasons, the Stipulation should be reversed as to the penalty provisions requiring a waiver of compensation claims, and the nonsettling RTC defendants should be allowed to participate in the Settlement without being subject to the disparate conditions previously imposed.

III. THE NINTH CIRCUIT'S OPINION CREATES A FEDERAL "COMMON LAW" RULE OF DECISION IN CONTRAVENTION OF SUPREME COURT PRECEDENT.

In deciding to eliminate the nonsettling RTC defendants' common law right to obtain complete reimbursement of any compensatory damages they are forced to pay, i.e. indemnity, the district court improperly federalized Arizona common law on indemnity and found that no such rights exist. As district Judge Lambeth observed

> [T]he inquiry as to whether indemnity claims may be barred must be somewhat more stringent than that for contribution claims. Extinguishing a right of indemnity would give a great benefit to the settling tortfeasor, who might have been liable not only for its own share of the liability, but also might have been required to reimburse other defendants. Unless the Court, in its fairness inquiry, finds there are no indemnity claims, or that the only indemnity claims are in the nature of contribution, a bar against the indemnity claims seems inappropriate. (Footnoted omitted.) At least one Court of Appeals has found that rights of indemnity

> cannot be extinguished. See Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1984).
>
> Although the court does not necessarily espouse the 7th Circuit's per se rule, the court is not at this time prepared to accept a blanket ban on indemnity claims. The majority of courts considering the issue have rejected indemnity in the federal securities law context, the plaintiffs are also seeking common law relief under D.C. law.

In re NBW Commercial Paper Litigation, 807 F.Supp. 801, 811 (D.D.C. 1992).

The Ninth Circuit responded to this argument by citing a federal securities case that found "not a shred of logic upon which we could base a principled distinction between bar orders against contribution, on the one hand and orders against indemnity . . . on the other[.]" **(Opinion, App. B at B18-B19 (quoting In re U.S. Oil & Gas Litig., 967 F.2d 489, 495 (4th Cir. 1992)).)** Yet, this Court recently ruled, "[t]here is no Federal general common law" in the context of RTC actions like RTC v. Rice. O'Melveny & Myers v. FDIC, 114 U.S. 2048, 129 L.Ed.2d 67 (1994). Here, the RTC action is limited to common law relief. Here, as in Donovan v. Robbins, the record lacks any support for the principle that a settlement should interfere with the rights of tortfeasors to "concentrate the

whole deterrent effect of the judgment on that other person [settling defendants] if possible." 752 F.2d at 1178.

Moreover, the district court did not find that there were no indemnity claims. Instead, the district court relied on authority barring indemnity claims under federal law -- the Securities Act of 1933 and Securities Exchange Act of 1934, and claims based upon comparative indemnity to bar nonsettling defendants' state law based claims. In essence, the district court looked to federal law rather than the law of Arizona to analyze the validity of the nonsettling defendants indemnity and contribution claims.

Under such circumstances, the Ninth Circuit's position conflicts with a very recent holding of the First Circuit. The First Circuit reversed and remanded a summary judgment where the district court failed to discuss the asserted distinctions between the duty to indemnify and claims of contribution under state law. In re San Juan Dupont Plaza Hotel Fire Litigation, 45 F.3d 564, 568 (1st Cir. 1995). Thus, the settlement should be reversed with directions that the district court evaluate the non-settlors indemnity and contribution rights under Arizona law.

CONCLUSION

In light of the above, petitioners respectfully request that this Court issue a writ of certiorari reviewing the Ninth Circuit's judgment and decision.

DATED: August 28, 1995

Respectfully submitted,

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RTC v. GENE E. RICE, et al.
APPENDIX A

FILED: Jan 11, 1994

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

In re: Consolidated Pinnacle West Securities Litigation/Resolution Trust Corporation-MeraBank Litigation	Master File No. CIV 88-1830 PHX-PAR ORDER THIS DOCUMENT RELATES TO Resolution Trust Corporation v. Rice, et al. CIV91-0634 PHX PAR

The Resolution Trust Corporation ("RTC") in its corporate capacity, Pinnacle West Capital Corporation ("Pinnacle West"), and various individual defendants in the RTC Action[1] jointly

[1] Keith L. Turley, Dorothy Rae Turley, Henry B. Sargent, Jr., Claire

request that claims asserted by the RTC in that action against each of the RTC defendants and Mary Sandra Tiffany Leonard and Gloria Leonard (collectively, the "Settling RTC Defendants") be dismissed with prejudice and that the partial settlement of the RTC Action, pursuant to the terms of the Stipulation of Settlement dated as of November 24, 1993 (the "Stipulation") be approved. The joint motion further requests an

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Sargent, Pamela Grant, Daniel Cracchiolo, Donald N. Soldwedel, Lou Soldwedel, Maurice R. Tanner, Hazel H. Tanner, Douglas J. Wall, Mary A. Wall-Lambert, George E. Leonard, Jr., Peter C. Byrne, Beverly Byrne, Melvin L. Decker, Clarice O. Decker, Hayden C. Hayden, Catherine Hayden, Donald S. Johnson, Marian E. Johnson, Reginald T. Morrison, Catherine G. Morrison, Howard E. Kraft, Mary Ann Kraft, Gilberto I. Valdez, Gloria Ann Valdez, Dr. Morrison Warren, Margaret Warren, Jose Acosta, Aurora B. Acosta, Benjamin F. Williams, Daisy M. Williams, J. Darryl Lippincott, and Betty Jo Lippincott.

order barring Gene Rice, Lola Rice, Ernest Modzelewski, and Nancy Modzelewski (the "Nonsettling RTC Defendants") from pursuing claims for contribution and/or indemnity against the Settling Parties in the RTC Action, and also against nonparty settlor Pinnacle West.

The RTC filed a separate memorandum in support of the joint motion for good faith settlement determination requesting a pro tanto judgment offset rule such that the amount of any judgment the RTC may obtain against the Nonsettling RTC Defendants would be reduced by the amount of the settlement. Pinnacle West and the Settling RTC Defendants do not join in the RTC pro tanto request, but instead ask the court to adopt a proportionate judgment reduction rule.

The Nonsettling RTC Defendants filed a memorandum in opposition to the joint motion. They first argue that I should be disqualified from hearing the joint motion because of my role as settlement judge. They oppose the entry of any bar order, but if any order is entered, they specifically contend that the court should not adopt a pro tanto rule.

A hearing on the joint motion was held on December 29, 1993. Having considered argument and evidence submitted in support of, and in opposition to the Stipulation, and having considered other pleadings and papers relevant to the issues the Stipulation presents, the joint motion, and the RTC pro tanto memorandum, and good cause appearing therefor, I ruled from the

bench denying the Nonsettling RTC Defendants' request for disqualification, approving the Stipulation, granting the joint motion for a good faith settlement determination, and adopting a proportionate judgment reduction rule. An order to this effect has also been signed and entered. These findings and conclusions support the order.

FINDINGS OF FACT

1. Pursuant to orders entered by the district court in the Class Action, the Derivative Action, and the RTC Action, and to authorization by the Chief Judge of the Ninth Circuit, I was appointed as a district judge, sitting by designation in the District of Arizona, in December 1991, for the purpose of

directing settlement negotiations and coordinating settlement.

2. In that capacity I have participated in dozens of conferences having to do with the possibilities of structuring a settlement that would be satisfactory to all parties involved in each of the actions. The parties initially filed memoranda setting out their respective views and settlement positions. Those papers were exchanged among all parties. After that, I conferred on numerous occasions sometimes individually, sometimes in groups with counsel for each of the parties, and with counsel and representatives of the various insurers whose policies arguably were triggered by the claims asserted in each of the actions. During the course

of these extensive proceedings, I have naturally learned a great deal about the position of each party (and of the three insurers) on settlement. However, all of my knowledge about any of these actions has been obtained in the course of my duties as a district judge sitting by designation to assist in settlement. Nothing I know about these actions has come from an extrajudicial source.

3. If the settlement reflected in the Stipulation is not accomplished for any reason, I will not have anything further to do with any of the actions. Each will immediately be retransferred to the judge originally assigned for trial. Thus, my role has been and, in ruling on the pending motions, continues to be for settlement purposes only. I have not

had, and will not have, anything to do with determining the merits of any of the claims or defenses of any of the parties.

4. To disqualify the settlement judge in this case would impose a significant burden on the parties and the trial court. Each of the actions is complex, and the insurance coverage issues are extraordinarily complicated. Because neither Judge McNamee nor any other judicial officer has knowledge of the settlement negotiations, if a judge other than myself were required to decide the pending motions, the papers filed in support and in opposition would in all likelihood have been even more extensive, the new judge would have been required to familiarize himself with volumes of material relating to interrelated

actions, claims, and coverage issues, and I would undoubtedly have been requested to submit a declaration or recommended findings and conclusions with respect to the negotiations that led to the Stipulation. My knowledge of the settlement proceedings would therefore have become a part of the record for purposes of the good faith determination in any event.

5. As I have been fully informed on all aspects of the RTC's claims against the Nonsettling RTC Defendants and the Nonsettling RTC Defendants' claims against the RTC and possible claims over against other parties and nonparties, as well as the views of each side about defenses and the availability of insurance to cover potential

liability, I am in the best position to determine if the settlement process and the partial settlement reflected in the Stipulation have been in good faith.

6. The record reflects no statement that I have made or opinion I have expressed which reasonably could give rise to any impression of bias or lack of impartiality.

7. In the order transferring the RTC Action to implement the Stipulation, the trial judge ruled that there was no cause to disqualify me from implementing the settlement. No reason appears to rule to the contrary at this time.

8. As the record demonstrates, the Stipulation reflects a partial settlement

that was noncollusive. It was the product of vigorous, adversarial negotiations among the RTC, the Settling RTC Defendants, the Nonsettling RTC Defendants, Pinnacle West, and the insurers, which I helped to facilitate as a settlement judge.[2] The process was entirely arms-length. All parties were (and are) represented by extremely capable and experienced counsel, expert in regulatory matters.

9. In March 1993, after considerable and difficult discussions, the RTC's outside counsel expressed a willingness to recommend that the RTC settle with all the defendants in the RTC

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[2] The settlement process was likewise arms-length and in good faith with respect to the Class Action and Derivative Action.

Action for a payment of $25,000,000 and execution by those defendants of releases of all claims against the RTC related to Old MeraBank, including each of the Contested Compensation Actions and similar actions filed by Gene E. Rice and Ernest F. Modzelewski. Rice decided at that time not to settle with the RTC on those terms. In that connection, I met with Rice and his counsel to satisfy myself that Rice personally understood the potential costs and benefits. I find that Rice is a sophisticated businessman, ably represented, who has concluded after being fully informed and advised, that it is in his best interests to pursue his individual claim for affirmative relief against the RTC[3] and to forego settlement

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[3] At the time of Rice's decision the district court had entered summary judgment in the RTC's favor on Rice's

on any basis that would require him to relinquish that claim.

In April 1993, Modzelewski's counsel advised, in writing, that Modzelewski intended to dismiss his claim against the RTC with prejudice and thus participate in the settlement. However, on September 23, 1993, Modzelewski's counsel advised in writing that Modzelewski no longer wished to participate in the settlement on the terms to which he had previously agreed.

10. Throughout the settlement process, the Nonsettling RTC Defendants had the opportunity of participating fully in the negotiations. Their counsel

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affirmative claim for relief. That determination is now on appeal. As of this date no decision has been rendered.

attended settlement conferences and was kept informed of the progress of negotiations; in addition, counsel for the Nonsettling RTC Defendants and the RTC's outside counsel conferred separately and with me, as did the insurers, in an effort to develop a mutually acceptable, creative compromise. Even though these efforts failed, counsel for the Nonsettling RTC Defendants had the opportunity to review and respond to the settlement documents as they were being negotiated, drafted, and submitted for the court's approval.

11. The overall consideration received by the RTC in settlement is substantial, reasonable, and fair in light of the facts that (1) the RTC maintains that all its claims have merit,

including both the claims it has asserted in the RTC Action against the Settling RTC Defendants, and its potential claims for compensatory damages against Pinnacle West; (2) the Settling RTC Defendants deny each of the RTC's claims; (3) Pinnacle West denies each of the RTC's potential claims; (4) the payment of $25,000,000, plus accrued interest, to the RTC in partial settlement of the RTC Action represents an amount not less than the fair share of the aggregate common liability, if any, of the Settling RTC Defendants and Pinnacle West; (5) there are risks inherent in continued litigation; (6) there are substantial difficulties associated with applicable insurance coverage in light of the various coverage defenses asserted by the insurers; (7) continued litigation

subjects the parties to the possibility of dissipation or loss of assets; and (8) the Settling RTC Defendants and Pinnacle West should pay less in settlement than the claimed damages asserted by the RTC.

12. I have considered the release and dismissal of certain Contested Compensation Actions (as that term is defined in the Stipulation) against the RTC by Hayden C. Hayden, Howard Kraft, Donald S. Johnson, Reginald T. Morrison, Melvin L. Decker, and Peter C. Byrne (the "Contested Compensation Plaintiffs"). The Contested Compensation Plaintiffs assert that their claims have merit, and the RTC denies the allegations in each of the Contested Compensation Actions. As a condition of the release and dismissal of the RTC claims against them, the

Contested Compensation Plaintiffs release and dismiss the Contested Compensation Actions against the RTC.

13. I have also considered the $465,500,000 paid by Pinnacle West in March 1990 to the RTC as receiver for MeraBank, a Federal Savings Bank, pursuant to a settlement agreement with the Office of Thrift Supervision dated December 6, 1989, relating to MeraBank.

14. The settlement of the Contested Compensation Actions, the Class Action, and the Derivative Action, and the partial settlement of the RTC Action set forth in the Stipulation are inextricably interrelated. Pinnacle West has substantially facilitated and contributed to the settlement of these consolidated

actions by, among other things, funding the premium expense for the various directors' and officers' liability insurance policies, certain proceeds of which have, in addition to the further contribution by Pinnacle West of $5,750,000, fully funded the settlement of these three consolidated actions. The settlement of these consolidated actions, as set forth in the Stipulation, would not have occurred without Pinnacle West's contribution of $5,750,000 to the settlement or without Pinnacle West's authorization of the payment made by the insurers into the Derivative Settlement Fund pursuant to Paragraph 3.1 of the Stipulation, the proceeds of which will be used for, among other things, the full funding of the settlement with the RTC. In addition, in light of the progress of

settlement negotiations, Pinnacle West and the RTC entered into a tolling agreement whereby all claims the RTC would have asserted in a complaint against Pinnacle West, together with all defenses Pinnacle West would have asserted against the RTC, were preserved. Without this agreement, Pinnacle West would have been made a party to the RTC Action.

15. The Nonsettling RTC Defendants were offered an opportunity to participate in the settlement on the same terms as offered to, and accepted by, co-defendant Settling Parties who are essentially similarly situated. Each had asserted a compensation claim against the RTC; however, the Stipulation requires all the Contested Compensation Plaintiffs

to dismiss their Contested Compensation Actions against the RTC. Although Modzelewski originally agreed to these terms, he later decided to reject them. Rice, who declined to settle on the terms accepted by the Settling RTC Defendants from the outset, was subsequently offered the opportunity to settle on different terms which would have been more favorable than those offered to others. In September 1993, counsel for the RTC made a number of proposals increasing the amount of the receivership certificates the RTC was willing to issue to Rice in an effort to induce him to settle his claims. Rice continued to believe his claim for monetary compensation warranted a higher offer, and refused settlement on these terms. In later November and early December, the excess carrier offered to

fund settlement of the Rice and Modzelewski claims in exchange for a full release by the RTC of its claims. The RTC was unwilling to accept settlement on these terms.

16. There is no evidence that the settlement was ever structured so as to deprive the Nonsettling RTC Defendants of insurance coverage for the claims asserted by the RTC.[4] To the contrary, the record indicates that the objective throughout was to achieve a global settlement. Although that objective was ultimately not achieved because the Nonsettling RTC Defendants concluded that

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[4] The Declaration of Peter K. Rosen in support of the Nonsettling RTC Defendants' position is largely based on speculation and hearsay, and the conclusions drawn do not accord with the reality of the settlement process or the record.

their individual claims for affirmative relief against the RTC were worth more than the RTC was willing to give up, and the RTC concluded the opposite, at no time did any of the settling parties or their insurers indicate that their settlement position was in any way motivated by the possibility of exhausting insurance coverage of any Nonsettling RTC Defendants. Indeed, both the RTC and the Nonsettling RTC Defendants maintain that substantial coverage exists with respect to the RTC claims; the insurers, or course, disagree. So far as attorneys' fees and expenses are concerned, whatever dispute there may be does not arise from the Stipulation and is a matter to be resolved as between individual defendants and the carriers. In any event, the

record does not reflect that the Nonsettling RTC Defendants are situated any differently from the Settling RTC Defendants in this respect.

16. The creation of the Class Settlement Fund and the Derivative Settlement Fund was motivated by tax considerations, as well as the need to avoid direct payment to the RTC in light of the regulatory exclusions in some of the insurance policies. The insurers have agreed to advance sufficient funds necessary to effectuate the settlement, subject to an agreement among them to arbitrate at a later date issues related to applicable policy years and the exposure of each insurer. Consequently, as of this date, the precise extent to

which insurer will be held in liable for the settlement contributions is unknown.

17. There is no collusion, bad faith, fraud, or tortious conduct in entering into the Stipulation by any of the Settling Parties aimed at causing injury to the interests of the Nonsettling RTC Defendants or any person not a party to the Stipulation.

18. Any finding of fact inappropriately designated as a conclusion of law is incorporated herein.

CONCLUSIONS OF LAW

1. Under 28 U.S.C. § 455(a), a judge must disqualify himself in any proceeding in which his impartially might

reasonably be questioned. The test for impartiality is an objective one: The judge must disqualify himself "only when a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Winston, 613 F.2d 221, 222 (9th Cir. 1980).

Under § 455(b), a judge is required to disqualify himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Disqualification is appropriate only when the information is derived from an extrajudicial source. Winston, 613 F.2d at 222.

"Settlement negotiations clearly are not an 'extrajudicial' source of information, and participation in settlement discussions does not require disqualification." United States v. Conservation Chem. Co., 106 F.R.D. 210, 234 (W.D. Mo. 1985). "If comments made by a court in the course of pretrial proceedings . . . were regarded as extra-judicial, the court's ability to promote the settlement of civil litigation would be crippled." Fong v. American Airlines, Inc., 431 F. Supp. 1334, 1338-39 (N.D. Cal. 1977).

Relying solely on In re MGM Grand Hotel Fire Litig., 570 F. Supp. 913 (D. Nev. 1983), the Nonsettling RTC Defendants contend that a judge who actively participates in settlement

negotiations should be disqualified from determining the good faith of the settlement. Nothing in MGM requires the judge to appoint a separate "settlement coordinator" to prevent disqualification, however. Indeed, "[i]t would be incomprehensible to suggest that a court be disqualified every time it explores settlement of a case which it is required to do under the Federal Rules." Id. at 926.

There are no grounds for disqualifications here. No extrajudicial information was received, and the Nonsettling RTC Defendants have shown no evidence of bias or prejudice. Nor is there any basis for concluding that a reasonable person with knowledge of the process would conclude that the judge's

impartiality might reasonably be questioned.

2. The Stipulation was arrived at by arms-length negotiations, all parties were assisted by experienced counsel, and it is a fair and reasonable resolution of the RTC Action. The settlement process was conducted in good faith by all concerned and the settlement reflected in the Stipulation is noncollusive. The consideration provided by Pinnacle West and the Settling RTC Defendants under the Stipulation is fair and reasonable and confers a substantial benefit on the RTC. In light of this benefit, as well as the substantial defenses to liability that the Settling RTC Defendants and Pinnacle West would assert to the RTC's claims, the uncertainty of insurance coverage for

the RTC Action other than in the context of the proposed settlement, and the absence of any collusion in negotiating and consummating the settlement, the agreement embodied in the Stipulation is neither too cheap a settlement, nor too expensive a settlement. It is therefore approved as having been entered into and made in good faith.

3. Based upon all of the relevant terms of the settlement, including the financial contributions made by or on behalf of the Settling RTC Defendants, and in light of the facts and circumstances underlying the RTC Action, each of the Settling RTC Defendants is entitled to protection against the expense and burden of further claims and litigation relating to the RTC Action as

provided in Paragraph 5 of the order entered December 29, 1993.[5]

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[5] It provides:

> 5. All claims, however denominated, regardless of the allegations of fact, law, theories, or the principles on which they are based, including all claims for contribution, reimbursement, equitable apportionment or indemnity (except claims based upon a specific written agreement of indemnity) arising under any federal or state law (whether common law or statutory), rule, regulation, or order in equity, that have been or could have been asserted against the Settling RTC Defendants, Mary C. Leonard, or Pinnacle West by the Nonsettling RTC Defendants or, to the extent legally permissible, by any other entity or person not a party to the RTC Action, which claims now exist or have accrued or in the future may exist or accrue, and which arise out of, are based on, or relate in any way to the subject matter of the RTC Action, are hereby extinguished, discharged, satisfied, dismissed with prejudice, and barred, and the future filing of such claims is

4. The Nonsettling RTC Defendants argue that regardless of whether their claims against the Settling RTC Defendants may be barred, the court cannot bar their claims for contribution and indemnity against Pinnacle West because it is not a party to the RTC Action. They rely on Employers Ins. v. Musick, Peeler & Garrett, 954 F.2d 575 (9th Cir. 1992), aff'd on other grounds, 113 S. Ct. 2085 (1993), FDIC v. Geldermann, Inc., 975 F.2d 695 (10th Cir. 1992), and In re NBW Commercial paper Litig., 807 F. Supp. 801 (D.D.C. 1992). None of these opinions precludes including Pinnacle West in the bar order in the circumstances of this case.

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hereby enjoined.

In Musick, Peeler & Garrett, the court held that "a settlement agreement cannot be relied upon to bar subsequent actions for contribution by settling defendants against individual who were not party to the original suit." 954 F.2d at 579 (emphasis added). The court reasoned that bar orders are intended to protect settling parties from being used by nonsettling parties, not to prevent settling parties from seeking contribution from others generally. Id.

In Geldermann, the FDIC sought an order barring the defendants from asserting claims of indemnity or contribution against certain nonparties with whom the FDIC had settled in unrelated litigation. 975 F.2d at 696. The Tenth Circuit held that because the

FDIC was not the real party in interest to request the bar order, Fed. R. Civ. P. 17(a) prevented the court from addressing the FDIC's request. Id. at 697. Whereas the nonsettling parties in Geldermann were not before the court in any sense, here Pinnacle West was fully involved and it -- not the RTC -- is seeking a bar order for itself.

Finally, NBW is distinguishable because the proposed settlement contained a provision requiring the adoption of a pro tanto judgment offset rule, and because the nonsettling defendant in that case was the FDIC. 807 F. Supp. at 806. It is clear that the court's refusal to approve the settlement rested in large part on both of these factors. See id. at 806-10. Had the settlors in NBW

agreed to a proportionate offset rule, such as the one I adopt in the present case, the court would have likely approved the settlement and granted the bar order.

A bar order in the instant case will protect the Settling Parties. Although Pinnacle West is not a defendant in the RTC Action, the RTC has indicated that it would pursue claims against Pinnacle West and both its claims and Pinnacle West's defenses are subject to a tolling agreement. Pinnacle West is a critical party to the overall settlement of the consolidated actions. Moreover, Pinnacle West has contributed substantial value to the overall settlement, without which the partial settlement in the RTC Action could not have occurred. Under these

circumstances, I conclude that the bar order should also apply to any subsequent claims against Pinnacle West.

5. The Nonsettling RTC defendants also contend that even if claims for contribution may be subject to a bar order, and even if Pinnacle West may be included despite being a nonparty to the RTC Action, indemnity is different and their claims for indemnification should not be barred. They rely principally on Donovan v. Robbins, 752 F.2d 1170, 1178 (7th Cir. 1984), and NBW, 807 F. Supp. at 811, both of which distinguish claims for contribution from claims for indemnity.

As the Eleventh Circuit recently noted in In re U.S. Oil & Gas Litig., 967 F.2d 489, 495 (11th Cir. 1992), however,

a number of federal courts have approved settlement bars against indemnity claims. See, e.g., In re Jiffy Lube Sec. Litig., 927 F.2d 155, 158 (4th Cir. 1991); Frankin v. Kaypro Corp., 884 F.2d 1222, 1225 & n.2 (9th Cir. 1989), cert. denied sub nom. Franklin v. Peat Marwick Main & Co., 498 U.S. 890 (1990); Dalton v. Alston & Bird, 741 F. Supp. 157, 161 (S.D. Ill. 1990). In addition, the Second Circuit recently stated that "[w]here a defendant seeks indemnity based on differences in fault, we see no reason why a court-approved settlement bar should have a different effect on that right than it would have on contribution." In re Masters Mates & Pilots Pension Plan & IRAP Litig., 957 F.2d 1020, 1032 (2d Cir. 1992).

I also note that the bar order I have signed does not apply to any contractual claims for indemnity that the Nonsettling RTC Defendants may have. Under the present circumstances, I conclude that it is appropriate to bar all other indemnity claims.

6. In connection with the bar order sought by the Settling Parties, the RTC urges that a pro tanto judgment offset rule should be adopted. A pro tanto bar order would reduce any judgment obtained by the RTC against the Nonsettling RTC Defendants by the amount of the settlement. Both the Settling and the Nonsettling RTC Defendants seek a comparative fault judgment rule, which would limit the liability of the

Nonsettling RTC Defendants to their proportionate share of fault.

Federal law governs the determination of the rights of the RTC in the present action. See 12 U.S.C. § 1441(1)(1); RTC v. Gallagher, 815 F. Supp. 1107, 1109 (N.D. Ill. 1993); cf. FDIC v. New Hampshire Ins. Co., 953 F.2d 478, 481 (9th Cir. 1991) (interpreting similar language in parallel jurisdictional provision governing FDIC). Because 12 U.S.C. § 1821(k), the applicable federal statute, does not prescribe a settlement bar rule, this Court may, as a matter of federal common law, either adopt the prevailing state statute as the federal rule of decision or alternatively, fashion a uniform federal rule. United States v. Kimbell

Foods, Inc., 440 U.S. 715, 728 (1979). It is not necessary to resolve that question here, because the proportionate judgment rule I shall adopt is consistent with both.[6]

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[6] See, e.g., Kaypro, 884 F.2d at 1231 (adopting proportionate rule in context of partial settlement of securities class action). In Kaypro, the court found that the proportionate offset method satisfies the goals of deterrence, equity, and encouragement of settlements. Id.

Arizona has abolished joint and several liability in favor of a comparative fault system, subject to certain exceptions that do not appear applicable here. Ariz. Rev. Stat. § 12-2506(A). Although the RTC argues that under § 12-2504(1), a pro tanto rule is appropriate, this section does not apply if joint and several liability is unavailable. See Rowland v. Bernstein, 171 Ariz. 96, 97-98, 828 P.2d 1237, 1238-39 (Ct. App. 1991) (§ 12-2504 has no effect on rule of several liability under § 12-2506).

The RTC offers two principal arguments in favor of a uniform federal pro tanto rule: (1) the compelling federal interest in allowing full recovery by the RTC for the taxpayers; and (2) the need to encourage settlement and reduce litigation costs. While it may be true that a pro tanto rule is appropriate in some RTC cases, neither of these rationales is persuasive given the unique facts of this particular case. First, through its earlier settlement with Pinnacle West, the RTC in its receivership capacity has already recovered $465.5 million. This, in addition to the $25 million it will receive under the terms of the Stipulation, indicates that the taxpayers' interests have been well served already.

Second, the settlement was accomplished and the Stipulation entered into without reference to an offset rule. Thus, a pro tanto rule can have no incentive effect in this case. Further, the type of offset rule is more likely to affect the RTC's incentive to settle in those situations where the defendants are different entities with different sources of funds from which the RTC can satisfy its claims. For example, many cases will involve one or more accounting firms, law firms, and individual officers and directors who are separately insured. In such cases, a pro tanto rule may encourage settlement because as a practical matter, the RTC will be able to collect more money from some defendants than from others. By contract, all of the individual defendants in this case

are identically situated in that their primary source of funds is the same group of insurance policies. If there are any exclusions to coverage, they apply to all the RTC defendants. And because the Nonsettling RTC Defendants lack any significant assets to cover a subsequent judgment against them, the RTC will not collect any more or less from them than it could collect from the Settling RTC Defendants. Under these circumstances, the RTC's argument based on incentive lacks substantial force.

Finally, a proportionate judgment rule squares more closely with he RTC's theory of the case against the Settling and Nonsettling Defendants. Because the RTC alleges mismanagement of particular loan portfolios, the Nonsettling RTC

Defendants' liability is appropriately limited to their relative culpability. Accordingly, based on the particular circumstances in this case, I conclude that the proportionate judgment rule is the proper offset rule to adopt.

7. As the Nonsettling RTC Defendants concede, the use of a proportionate judgment offset rule obviates the need for an extensive hearing on the fairness of the settlement. In essence, the Nonsettling RTC Defendants are left in the same position they would have been in if the other parties had not settled.

8. The partial settlement set out in the Stipulation constitutes a good faith settlement. Under the "tortious

conduct" standard, all settlements are presumed fair and in good faith unless there is evidence of collusion or other tortious conduct. City of Tucson v. Superior Court, 161 Ariz. 441, 444, 778 P.2d 1337, 1340 (Ct. App. 1989), aff'd, 165 Ariz. 236, 798 P.2d 374 (1990).[7] The Stipulation is not collusive or in bad faith. The negotiations were lengthy, hard-fought, and conducted under this court's supervision. All parties, including the Nonsettling RTC Defendants, were ably represented by competent counsel.

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[7] Because I do not adopt the pro tanto judgment offset method, it is unnecessary to decide whether the settlement meets the more stringent "reasonable range" test that some states have adopted. See, e.g., Tech-Bilt, Inc. v. Woodward-Cycle & Assocs., 38 Cal. 3d 488, 499, 698 P.2d 159, 166-67, 213 Cal. Rptr. 256, 263 (1985).

There is no basis for the Nonsettling RTC Defendants' contention that the Stipulation was intended to injure their interests. To the contrary, they will benefit from the settlement. In particular, Rice, at no personal expense, is being dismissed from the Class and Derivative Actions for which he is personally liable for substantial damages, including claims that were asserted solely against him in the Derivative Action for alleged securities fraud in connection with his sale of MeraBank stock.

The consideration provided by Pinnacle West and the Settling RTC Defendants under the Stipulation confers a substantial benefit on the RTC. In light of this benefit, as well as the

substantial defenses to liability that the Settling RTC Defendants and Pinnacle West would assert to the RTC's claims, the uncertainty of insurance coverage for the RTC action other than in the context of the proposed settlement, and the absence of any collusion in negotiating and consummating the settlement, the agreement embodied in the Stipulation is in good faith.

9. Any conclusion of law inappropriately designated as a finding of fact is incorporated herein.

DATED: January 7, 1994

/s/ Pamela Ann Rymer

Pamela Ann Rymer
United States Circuit Judge

(sitting by designation)

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RTC v. GENE E. RICE, et al.
APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Consolidated Pinnacle West Securities Litigation/ Resolution Trust Corporation-Merabank Litigation.	
RESOLUTION TRUST CORPORATION, et al., Plaintiffs-Appellees, v. GENE E. RICE, LOLA RICE, ERNEST F. MODZELEWSKI, NANCY MODZELEWSKI, Defendants-Appellants.	No. 94-15431 D.C. No. CV-88-01830-PAR OPINION

Appeal from the United States District Court for the District of Arizona
Pamela Ann Rymer,
Circuit Judge, Presiding

Argued and Submitted
November 16, 1994--San Francisco, California

Filed March 23, 1995

Before Donald P. Lay,* Harry Pregerson, and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Lay

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* Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

SUMMARY

Banking/FDIC and FSLIC/Civil Litigation Procedure

The court of appeals affirmed a district court judgment. The court held that a settlement agreement that encompassed the Resolution Trust Corp.'s suit against many of a failed bank's former officers and directors and a number of interrelated actions arising out of the bank's failure, did not unfairly prejudice two of the bank's highest ranking officers.

Appellee the Resolution Trust Corp. (RTC), which had become the receiver for Merabank, sued many of MeraBank's former directors and officers. Interrelated

actions arising out of MeraBank's failure also were brought in the form of two shareholders' class actions, a derivative suit, and directors' and officers' contested compensation suits.

Over 40 parties agreed to join in a settlement, including a class of shareholders, a group of derivative plaintiffs, Pinnacle West Capital Corp., several of Merabank's former officers and directors, two directors' and officers' liability insurers and the RTC. The settling officers and directors of Merabank gave up their contested compensation claims against the RTC in exchange for releases from all personal liability, including contributing to the settlement fund.

The district court approved the settlement agreement, finding that it was arrived at in good faith and was a fair and reasonable resolution of the RTC and consolidated actions. As part of its final judgment, the court barred appellants Gene Rice, Lola Rice, Ernest Modzelewski and Nancy Modzelewski (collectively, the Nonsettlors) from asserting certain contribution and indemnity claims against the settling defendants. However, the court also adopted a comparative fault offset rule, limited the potential liability of the Nonsettlors to their proportionate share of fault.

The Nonsettlors appealed, claiming that the settlement unfairly prejudiced them, violated their due process rights

and inappropriately barred a number of their claims against the settling parties.

[1] Nothing in the record indicated the district court abused its discretion in finding the settling parties reached their agreement in good faith. There was no evidence that the settling parties singled out the Nonsettlors for disparate treatment. Although Mr. Rice and Mr. Modzelewski were among the highest ranking officers at Merabank and the compensation claims they were asked to give up were potentially more valuable than those of the settling officers and directors, the worth of the claims was at best speculative. [2] Moreover, because the district court ultimately adopted a proportionate judgment rule, the

Nonsettlors were not prejudiced. There was no reason to upset the district court's conclusion that the settlement process and result were fair.

[3] The district court did not abuse its discretion in finding nonparty Pinnacle West to be a critical participant and contributor to the overall settlement, and thereby applying the bar order to subsequent non-contractual claims against it. Furthermore, the district court was correct in rejecting the proposition that settlement bars are effective against contribution claims but not against claims for indemnity. Thus, the district court did not abuse its discretion in barring the Nonsettlors' contribution and

non-contractual indemnity claims against the settling parties.

COUNSEL

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OPINION

LAY, Circuit Judge:

Gene Rice, Lola Rice, Ernest Modzelewski, and Nancy Modzelewski ("the Nonsettlors") appeal the district court's approval of the partial settlement of a Resolution Trust Corporation ("RTC") lawsuit against many of Merabank's former directors and officers.[1] In addition to the RTC's suit, the settlement encompassed a number of interrelated actions arising out of the failure of Merabank, after which the RTC became receiver. These included two shareholders' class actions, a derivative suit, and directors' and officers' contested compensation suits. Ultimately, over forty parties agreed to join the settlement, including a class of

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[1]Honorable Pamela Ann Rymer, United States Circuit Judge for the Ninth Circuit, sitting by special designation.

shareholders, a group of derivative plaintiffs, Pinnacle West Capital Corporation (which had previously acquired Merabank), several of Merabank's former officers and directors, two directors' and officers' liability insurance companies ("D & O insurers"), and the RTC.[2] The settling officers and directors of Merabank gave up their contested compensation claims against the RTC in exchange for releases from all

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[2]The aggregate amount of the settlement totaled $61,625,000. This amount reflects a full settlement of the class and derivative actions, and a partial settlement of the RTC action. Pinnacle West paid $5,750,000 to the class settlement fund, and the D & O insurers contributed $55,875,000 to the overall settlement. Of the latter amount, approximately half was deposited in the class settlement fund and half went to the derivative settlement fund. The settlement further provided that $25 million of the derivative fund would be paid to the RTC.

personal liability, including contributing to the settlement fund.

In approving the settlement agreement, the district court found that it was arrived at in good faith and was a fair and reasonable resolution of the RTC and consolidated actions. *See In re Consolidated Pinnacle West Sec. Litig.*, No. CIV 88-1830, slip op. at 13, 21 (D. Ariz. Jan. 11, 1994). As part of its final judgment, the court barred the Nonsettlors from asserting certain contribution and indemnity claims against the settling defendants, but also adopted a comparative fault offset rule, limiting the potential liability of the Nonsettlors to their proportionate share

of fault.[3] *Id.* at 19. The Nonsettlors now appeal, claiming the settlement unfairly prejudiced them, violated their due process rights, and inappropriately barred a number of their claims against the settling parties. We affirm.

[1] Although this case involves a complex web of parties and lawsuits, we find the analysis is relatively straightforward. First, we reject the Nonsettlors' claim that the settlement

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[3]After entry of this judgment, the only surviving claims were the RTC's action against the Nonsettlors, Rice's and Modzelewski's compensation claims against the RTC, and any contractual indemnity claims the Nonsettlors may have. In 1994, this Court ruled that Modzelewski had no claim for compensation against the RTC because his rights in the deferred compensation had not vested before the RTC took over Merabank. *See Modzelewski v. RTC*, 14 F.3d 1374, 1378 (9th Cir. 1994). Thus, Rice has the only compensation claim that survives today.

was not reached in good faith and unfairly prejudiced them. We see nothing in the record that indicates the district court abused its discretion in finding the settling parties reached their agreement in good faith. There is no evidence that the settling parties singled out the Nonsettlors for disparate treatment: While the compensation claims Rice and Modzelewski were asked to give up potentially more valuable than those of the settling officers and directors, the worth of the claims was at best speculative.[4] In fact, because Rice and

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[4]Rice sought over $4,000,000 in his contested compensation claim, and Modzelewski sued for approximately $2,000,000. They allege that the settling officers' and directors' claims were for only $180,000 to $652,000. This Court's previous holding that Modzelewski has no claim for compensation because his rights did not vest illustrates the speculative nature of the allegations. *See Modzelewski*, 14 F.3d at 1378. Thus,

Modzelewski were among the highest ranking officers at Merabank, and therefore potentially subject to the greatest liability, they may have benefited more from the settlement than their settling counterparts, had they chosen to participate.[5] Thus, the

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merely because Rice and Modzelewski were asked to give up claims that alleged greater damages -- in exchange for a release from personal liability -- does not mean they were treated unfairly or differently than the settling directors and officers.

[5]Furthermore, the Nonsettlors are currently benefitting from the settlement agreement. For example, the district court concluded:

> Rice, at no personal expense, is being dismissed from the Class and Derivative Actions for which he is personally liable for substantial damages, including claims that were asserted *solely against him* in the Derivative Action for alleged securities fraud in connection with his sale of MeraBank stock.

Nonsettlors have not established that they were treated differently or worse than the settling officers and directors during the negotiations.

[2] Moreover, because the district court ultimately adopted a proportionate judgment rule, the Nonsettlors were not prejudiced. As the district court found, the Nonsettlors "are left in the same position they would have been in if the other parties had not settled." *In re Consolidated Pinnacle West Sec. Litig.*, No. CIV 88-1830, slip op. at 20. Because of the absence of prejudice or any evidence of collusion or other tortious conduct, we reject the Nonsettlors' contention that the court should have

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In re Consolidated West Sec. Litig., No. CIV 88-1830, slip op. at 20 (emphasis added).

undertaken a more stringent analysis of the good-faith issue.[6] We see no reason

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[6]In addition, contrary to the Nonsettlors' contention, the district court did not limit its good-faith analysis solely to whether there was collusion between the settling parties. The court made factual findings that the Non-settlors were "offered an opportunity to participate in the settlement on the same terms as offered to, and accepted by, [the settling parties] who are essentially similarly situated"; there was no evidence the agreement was structured to deprive the Nonsettlors of insurance coverage; the "objective throughout was to achieve a global settlement"; and there was no collusion, bad faith, or tortious conduct in reaching the settlement agreement. *In re Consolidated Pinnacle West Sec. Litig.*, No. CIV 88-1830, slip op. at 9-11. The court then evaluated the circumstances surrounding the settlement, and in particular the compromises struck by the RTC, and determined the settlement had been reached and made in good faith. The court concluded:

> The Stipulation was arrived at by arms- length negotiations, all parties were assisted by experienced counsel, and it is a fair and reasonable resolution of the RTC Action. The settlement process was conducted in good faith by all

to upset the court's conclusion that the settlement process and result were fair.

Second, the Nonsettlors' due process (and FIRREA) argument is without merit. The Nonsettlors were not prejudiced by the settlement, and therefore the RTC did not unfairly penalize them or deprive them of a property or liberty interest.

[3] Finally, we reject the Nonsettlors' challenges to the district court's bar order. The district court did not abuse its discretion in finding nonparty Pinnacle West to be a critical participant and contributor to the overall settlement, and thereby applying

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> concerned *and* the settlement reflected in the Stipulation is noncollusive.

Id. at 13 (emphasis added).

the bar order to subsequent non-contractual claims against it. For this reason, and because the court applied a proportionate rather than pro tanto offset rule, we agree with the court's conclusion that the cases cited by the Nonsettlors concerning nonparties and bar orders are distinguishable. *See In re Consolidated Pinnacle West Sec. Litig.*, No. CIV 88-1830, slip op. at 14-16 (distinguishing cases). Furthermore, we concur with the district court and a number of federal courts that have rejected the proposition that settlement bars are effective against contribution claims but not against claims for indemnity. *See id.* at 16-17; *see also In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 495 (4th Cir. 1992) (finding "not a shred of logic upon which we could base a

principled distinction between bar orders against contribution, on the one hand, and orders against indemnity . . . on the other," and listing other courts that have approved bar orders for indemnity claims). Thus, we find the district court did not abuse its discretion in barring the Nonsettlors' contribution and non-contractual indemnity claims against the settling parties.

For the foregoing reasons, we AFFIRM.

RTC v. GENE E. RICE, et al.
APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: June 5, 1995

In re: Consolidated Pinnacle West Securities Litigation/Resolution Trust Corporation-Merabank Litigation	No. 94-15431 D.C. No. CV-88-01830-PAR
RESOLUTION TRUST CORPORATION, Plaintiff-Appellee, vs. GENE E. RICE, LOLA RICE, ERNEST F. MODZELEWSKI, NANCY MODZELEWSKI, Defendants-Appellants.	O R D E R

Before: LAY,* PREGERSON, and
O'SCANNLAIN, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Pregerson and O'Scannlain voted to reject the suggestion for rehearing en banc and Judge Lay would so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Donald P. Lay, Senior Circuit Judge for the Eight Circuit, sitting by designation.

(2)

No. 95-358

FILED
DEC 18
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GENE E. RICE, *et al.*,
Petitioners,
v.
RESOLUTION TRUST CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS PINNACLE WEST CAPITAL CORPORATION; BENJAMIN F. WILLIAMS; DAISY M. WILLIAMS; MORRISON F. WARREN; MARGARET WARREN; GEORGE E. LEONARD, JR.; MARY C. LEONARD; PETER C. BYRNE; BEVERLY BYRNE; MEL L. DECKER; CLARICE O. DECKER; HAYDEN C. HAYDEN; CATHERINE HAYDEN; DONALD S. JOHNSON; MARIAN E. JOHNSON; REGINALD T. MORRISON; CATHERINE G. MORRISON;

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QUESTIONS PRESENTED

1. Is it beyond the jurisdiction of a Federal District Court to issue an order approving a settlement and bar order barring claims over against an entity in consolidated civil actions, where:

(a) in all but one of the actions in which consideration is to be paid to plaintiffs that entity is a party (and in that action that entity executed a tolling agreement which caused it not to be joined as a defendant);

(b) the joinder of that entity in the only action in which it is not a party would not oust the District Court of jurisdiction;

(c) all the cases and their settlement are found to be "inextricably interrelated";

(d) the entity in question is subject to the jurisdiction of the court;

(e) the entity in question, either out of its own pocket or by paying the premiums on insurance, has been responsible for the entirety of the cash consideration paid to settle the consolidated cases; and

(f) that entity and the non-settling parties against whom the bar order runs participated fully in the settlement discussions and in the hearings on approval of the settlement?

2. Did the conduct of the settlement discussions in this case, or the positions taken by the Plaintiff RTC in connection with them, violate the procedural due process rights of the Petitioners or violate the Financial Institutions Reform, Recovery and Enforcement Act of 1989?

3. Did the courts below overlook any controlling provision of Arizona law in approving the settlement agreement or affirming that approval?

PARTIES AND CORPORATE AFFILIATES

A. *Rule 14.1(b)*

The Petitioners did not present a list of the Respondents (Appellees in the Court of Appeals) in this matter as required by Rule 14.1(b). The following entities and natural persons are Respondents:

The Resolution Trust Corporation, a federal agency and instrumentality created by the United States Congress, in its corporate capacity, in its capacity as receiver for and successor to MeraBank, A Federal Savings Bank, and in its capacity as receiver for and as successor to MeraBank Federal Savings Bank; Byrna Stepak, Hilda Schipper and Printing Management Services, Inc. Pension Plan (derivative plaintiffs); Pinnacle West Capital Corporation; Samuel Persky, Doris R. Morris, Bert Jordan, Jacqueline Jordan, Cecile Gould, and John Vertes (individually, and on behalf of the certified class); Keith L. Turley; Dorothy Rae Turley; Donald C. Heppermann; Karl Eller; Henry B. Sargent, Jr.; Claire Sargent; Pamela Grant; Daniel Cracchiolo; Richard Snell; Donald N. Soldwedel; Lou Edith Soldwedel; Maurice R. Tanner; Hazel H. Tanner; Douglas J. Wall; Mary A. Wall-Lambert; George E. Leonard, Jr.; Mary C. Leonard; Peter C. Byrne; Beverly Byrne; Mel L. Decker; Clarice O. Decker; Hayden C. Hayden; Catherine Hayden; Donald S. Johnson; Marian E. Johnson; Reginald T. Morrison; Catherine G. Morrison; Howard E. Kraft; Mary Ann Kraft; Gilberto I. Valdez; Gloria Ann Valdez; Dr. Morrison Warren; Margaret Warren; Jose Acosta; Aurora B. Acosta; Benjamin F. Williams; Daisy M. Williams; J. Darryl Lippincott; Betty Jo Lippincott; John R. Norton, III.

B. *Rule 29.6*

This brief is filed on behalf of all of the foregoing Respondents except the Resolution Trust Corporation.

The only Respondent on whose behalf this brief is filed which is a corporation is Pinnacle West Capital

Corporation. Pinnacle West Capital Corporation has no parent company, and its only corporate subsidiary which has stock in the hands of the public is Arizona Public Service Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-358

GENE E. RICE, *et al.*,

Petitioners,

v.

RESOLUTION TRUST CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS PINNACLE WEST CAPITAL CORPORATION; BENJAMIN F. WILLIAMS; DAISY M. WILLIAMS; MORRISON F. WARREN; MARGARET WARREN; GEORGE E. LEONARD, JR.; MARY C. LEONARD; PETER C. BYRNE; BEVERLY BYRNE; MEL L. DECKER; CLARICE O. DECKER; HAYDEN C. HAYDEN; CATHERINE HAYDEN; DONALD S. JOHNSON; MARIAN E. JOHNSON; REGINALD T. MORRISON; CATHERINE G. MORRISON; HOWARD E. KRAFT; MARY ANN KRAFT; GILBERTO I. VALDEZ; GLORIA ANN VALDEZ; JOSE ACOSTA; AURORA B. ACOSTA; J. DARRYL LIPPINCOTT; BETTY JO LIPPINCOTT; PAMELA GRANT; DANIEL CRACCHIOLO; DOUGLAS J. WALL; MARY A. WALL-LAMBERT; DONALD N. SOLDWEDEL; LOU EDITH SOLDWEDEL; MAURICE R. TANNER; HAZEL H. TANNER; KARL ELLER; JOHN R. NORTON, III; RICHARD SNELL; SAMUEL PERSKY; DORIS R. MORRIS; BERT JORDAN; JACQUELINE JORDAN; CECILE GOULD; JOHN VERTES; BYRNA STEPAK; HILDA SCHIPPER; PRINTING MANAGEMENT SERVICES, INC. PENSION PLAN; KEITH L. TURLEY; DOROTHY RAE TURLEY; HENRY B. SARGENT, JR.; CLAIRE SARGENT; AND DONALD C. HEPPERMANN

The above-named respondents oppose the grant of certiorari to review the judgment and opinion of the Court of Appeals for the Ninth Circuit in this matter. The opinion is reported at 51 F.3d 194 (1995).

STATEMENT

Petitioners (the "Non-Settlors") seek review of a unanimous judgment of the Court of Appeals affirming judgments of the District Court for the District of Arizona approving a global settlement as to ten consolidated lawsuits. The suits all involved the financial difficulties and receivership of MeraBank, a Federal Savings Bank ("MeraBank") which from 1986 was a wholly-owned subsidiary of Pinnacle West Capital Corporation ("Pinnacle West"). The global settlement, reached after lengthy negotiations in which the Non-Settlors participated, was approved at a hearing on December 29, 1993. (EOR 33-35; SEOR 4-9)[1] The judgments dismissed in their entirety two consolidated shareholder class actions alleging securities fraud, a shareholder derivative action against individuals, and six actions filed by six settling defendants against the Resolution Trust Corporation ("RTC"). The judgments also dismissed litigation initiated by the RTC as Receiver against various former officers and directors of MeraBank as to all defendants except the Non-Settlors. (*Id.*)

The Non-Settlors, Rice and Modzelewski, were two directors and officers of MeraBank who declined to agree to the settlement. They had each been executives of MeraBank for a number of years at the time of its acquisition by Pinnacle West. During the events at issue, Rice was MeraBank's Chairman of the Board and Chief Executive Officer. (EOR 1 at 9 ¶ 8(d)) From December 1986, following Pinnacle West's acquisition of MeraBank, to

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[1] Record references are as follows: "EOR" refers to the Appellants' [Non-Settlors'] Excerpts of Record in the Court of Appeals; "SEOR" to the Appellees' Supplemental Excerpts of Record; "CR" to the District Court Clerk's Record.

May 1990, Rice also was a director of Pinnacle West. (EOR 2 at 93 ¶ 6) At all relevant times, Modzelewski was a director and officer of MeraBank, and after June 1987 was its President. (EOR 3 at 181 ¶ 13)

As a condition to regulatory approval of Pinnacle West's acquisition of MeraBank in 1986, Pinnacle West entered into a "Capital Maintenance Stipulation" with the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("FHLBB") to maintain the capital of MeraBank at specified levels as long as Pinnacle West controlled it, and, if necessary, to infuse additional equity capital into MeraBank. (EOR 4 at 371-72 ¶ 2.17)

The Securities Class Action Lawsuits.—MeraBank's declining financial condition was a substantial contributor to declining financial performance by its parent, and commencing on November 7, 1988, two securities class action lawsuits on behalf of purchasers of Pinnacle West stock (the "Class Actions") were filed in the District Court against Pinnacle West, Rice and ten other officers and directors of Pinnacle West, and were thereafter consolidated. The complaints alleged violations of the federal securities laws and various pendent claims. (EOR 40 at 1752, CR 1; EOR 1 at 3-5; SEOR 12, CR 1; EOR 40 at 1760, CR 89) On December 24, 1991, the District Court certified a class consisting of purchasers of Pinnacle West common stock between April 1, 1987 and October 7, 1988. (EOR 40 at 1777, CR 257) Substantial damages were claimed. (EOR 1 at 4-5 ¶ 1, 8 ¶ 7(d))

Pinnacle West's Additional Cash Infusion Into MeraBank.—In the Spring of 1989, the FHLBB demanded that Pinnacle West make capital infusions into MeraBank pursuant to the Capital Maintenance Stipulation. (*Id.* at 108 ¶ 37) Pinnacle West contested the FHLBB's authority to impose the additional capital requirements on MeraBank and challenged the validity and enforceability of the Capital Maintenance Stipulation. (EOR 27 at 770 ¶ 13) Fol-

lowing months of negotiations, on December 6, 1989, Pinnacle West and the Office of Thrift Supervision ("OTS")[2] entered into an agreement (the "OTS Agreement") to release Pinnacle West from any purported obligations under the Captial Maintenance Stipulation upon payment to MeraBank by Pinnacle West of approximately $450 million, plus accrued interest. (EOR 4 at 372 ¶ 2.17)

The Shareholder Derivative Action.—A few days later, four Pinnacle West shareholders initiated a derivative action (the "Derivative Action") in the District Court against Rice and nine other directors of Pinnacle West. (EOR 4 at 368 ¶ 2.9) The complaint alleged that Pinnacle West's directors breached their fiduciary duties and wasted corporate assets as a result of Pinnacle West's diversification and expansion program. (EOR 2 at 91 ¶ 1) The complaint focused on Pinnacle West's 1986 acquisition of MeraBank, and among other things alleged violations by Rice of Section 12(2) of the Securities Act of 1933 in connection with his sale of MeraBank stock to Pinnacle West incident to the acquisition. (*Id.* at 99-109 ¶¶ 21-39, 119-20 ¶¶ 52-54) Substantial damages were claimed. (EOR at 97-99 ¶¶ 15-20)

The RTC Steps In.—The next month, January 1990, MeraBank was put in receivership and the RTC was appointed Receiver. (EOR 4 at 370 ¶ 2.13) In March 1990, in accordance with the OTS Agreement, Pinnacle West delivered to the Receiver a cash payment of approximately $310.5 million and a promissory note of approximately $155 million. The OTS, the RTC, and the Federal Deposit Insurance Corporation ("FDIC") each issued releases in favor of Pinnacle West and others. (EOR 4 at 372 ¶ 2.17)

About a year later, the RTC brought suit in the right of MeraBank in the District Court against Rice,

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[2] The OTS had succeeded in August 1989 to the functions of the FHLBB.

Modzelewski and eighteen other former officers and directors of MeraBank and their spouses (the "RTC Action").[3] (EOR 41 at 1804, CR 1) The complaint in the RTC Action alleged that the defendants' mismanagement caused MeraBank certain specific losses, asserting, *inter alia*, various common law claims for negligence, gross negligence, breach of fiduciary duty and breach of contract. (EOR 3 at 295-306 ¶¶ 404-430) As amended, the complaint alleged damages in excess of $374 million. (EOR 3 at 346 ¶ 402)

Although Pinnacle West was not joined as a defendant in the RTC Action, the RTC asserted during the settlement proceedings subsequently conducted by the District Court that it had potential claims against Pinnacle West for compensatory damages arising from Pinnacle West's ownership of MeraBank commencing in 1986. (EOR 4 at 372 ¶ 2.18; Pet. A14-15) Pinnacle West vigorously objected to the RTC's assertions and contended that the RTC, the OTS and the FDIC had released Pinnacle West from any further claims by virtue of the OTS Agreement and Pinnacle West's payment of approximately $465.5 million to the RTC in March 1990, after the receivership had commenced, and by virtue of the releases then issued. (Pet. A15, A17) After negotiations, Pinnacle West and the RTC entered into a tolling agreement whereby all claims the RTC would have asserted against Pinnacle West in a complaint, together with all defenses Pinnacle West would have asserted against the RTC, were preserved. (Pet. A18-19) The District Court later concluded that "[w]ithout this agreement, Pinnacle West would have been made a party to the RTC Action." (*Id.* at A19)

The Compensation Lawsuits.—In early 1991, Rice, Modzelewski, and six other former directors of MeraBank

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[3] *Resolution Trust Corp.* v. *Gene E. Rice*, D. Ariz., No. 91-CV-634. The spouses were sued by reason of Arizona community property law, so that their interests in community property could be available to respond to the RTC's claims if liability were established.

who all were defendants in the RTC Action filed separate lawsuits against the RTC as Receiver (the "Compensation Suits") seeking payment of additional compensation relating to their service at MeraBank.[4] (EOR 4 at 373-74 ¶ 2.21; EOR 27 at 765 ¶ 2; EOR 28 at 774 ¶ 2)

The Settlement Proceedings.—In January 1992, the District Court entered orders in the Class Actions, the Derivative Action, and the RTC Action, appointing Judge Pamela A. Rymer[5] to serve as a settlement judge. (SEOR 1-3) The District Court stayed further proceedings in each of these actions pending the settlement negotiations. (*Id.*) The District Court's orders were entered on consent of all parties, including the Non-Settlors. (*Id.*)

Throughout 1992 and 1993, Judge Rymer conducted settlement conferences attended by counsel for the parties, including counsel for the Non-Settlors, and by representa-

[4] The Non-Settlors' claims were under "Salary Continuation Agreements" and "Employment Agreements" entered into with MeraBank in 1984. The bulk of the claims were under the "Salary Continuation Agreements" under which they were to continue to receive their salaries for ten years after termination of employment. *See* the description in *Modzelewski* v. *Resolution Trust Corp.*, 14 F.3d 1374, 1376-77 (9th Cir. 1994). Treble damages were also sought under Arizona statutory law by both Non-Settlors which, Rice claimed, had the effect of grossing his claim up to $17,132,634. *See* Complaint, Exhibit C, *Rice* v. *Resolution Trust Corp.*, Civ. 91-0062 PHXEHC, D. Ariz., Jan. 11, 1991; *see generally* that Complaint and the Complaint in *Modzelewski* v. *Resolution Trust Corp.*, Civ. 91-0064, PHXPGR, D. Ariz., Jan. 11, 1991. The Court of Appeals, in *Modzelewski* v. *Resolution Trust Corp.*, *supra*, affirmed a summary judgment against Modzelewski dismissing his Compensation Suit on the merits while reversing and remanding for further proceedings a summary judgment which had been entered against Rice in his. *See* Pet. B12 n.3.

[5] A Judge of the Court of Appeals, specially assigned to the District Court in the cases in question; she previously had served as a District Judge for the Central District of California until May 22, 1989.

tives of Pinnacle West's directors' and officers' liability insurers (the "D&O Insurers"). (EOR 26 at 738-39 ¶ 4; Pet. A6-7) Judge Rymer also met separately with several of the parties, including Non-Settlor Rice. (EOR 26 at 747-48 ¶ 20)

Throughout the settlement process, the Non-Settlors had, and exercised, the opportunity to participate fully in the negotiations. (Pet. A13-14) Counsel for the Non-Settlors attended numerous settlement conferences and were kept fully informed of the progress of the negotiations. (*Id.*) In addition, their counsel had the opportunity to review and comment on the settlement documents as they were being negotiated and drafted. (*Id.*) Peter K. Rosen ("Rosen"), counsel for the Non-Settlors in this Court, has acknowledged that he attended all the settlement discussions conducted before Judge Rymer during 1992 and 1993 which involved the settling defendants' counsel. (EOR 26 at 738-39 ¶ 4) Rosen was an active and informed participant in those proceedings. (EOR 30 at 1526-27 ¶ 5)

A Settlement Is Negotiated.—During the last half of 1992 and the first quarter of 1993, Judge Rymer presided over extensive negotiations with counsel for the D&O Insurers and Pinnacle West in an effort to marshal sufficient insurance proceeds and other funds to effectuate a global settlement of the Class Actions, the Derivative Action, and the RTC Action. (*See* EOR 26 at 738-39 ¶ 4) Throughout this period, Judge Rymer had lengthy discussions on numerous occasions with counsel for all the participants in the settlement proceedings. After months of vigorous negotiations, it became apparent that there might be difficulties associated with the applicable insurance coverage in light of the various defenses asserted by the D&O Insurers. (Pet. A15; EOR 26 at 741-42 ¶ 9) In early 1993, Judge Rymer advised counsel for the parties that the commitments obtained from the D&O Insurers fell short of the plaintiffs' aggregate settlement demands in the Class Actions, Derivative Action and RTC

Action. (EOR 31 at 1657 ¶ 6) Following further extensive negotiations, plaintiffs' counsel in the private suits agreed to make significant concessions in order to achieve a global settlement. (*Id.*)

In early March 1993, after additional negotiations, counsel for the RTC expressed a willingness to recommend to the RTC that it settle with all defendants in the RTC Action and Pinnacle West for a payment of not less than $25 million and execution by those defendants and Pinnacle West of mutual releases of all claims relating to MeraBank, including the claims against the receivership estate asserted in each of the Compensation Suits. (EOR 25 at 731 ¶ 3; Pet. A11-12) Under this settlement proposal, none of the individual defendants (including the Non-Settlors) would have been required to make any out-of-pocket payment. Thus, all the plaintiffs in the Compensation Suits, including the Non-Settlors, were offered the opportunity to settle on identical terms. (Pet. A19-20)

Rice Asks for "More."—Rice demanded that in addition to the RTC's releasing its claim against him, it should pay him $3 million in cash to settle his Compensation Suit. (EOR 26 at 744-45 ¶ 15) Although the RTC rejected Rice's demand, counsel for the RTC advised counsel for Rice that he would consider recommending to the RTC that the RTC consider a smaller payment to settle Rice's Compensation Suit. (*Id.*)

On March 8, 1993, Judge Rymer reconvened the settlement proceedings. (*Id.* at 745 ¶ 16) Counsel for all participants in the settlement process, including the Non-Settlors, attended all these proceedings, which extended through March 10, 1993. (*Id.*) During these proceedings, all the plaintiffs in the Compensation Suits, except the Non-Settlors, agreed to relinquish their claims against the RTC in exchange for the release and dismissal of all claims asserted by the RTC against them in the RTC Action. (Pet. A12-13, A16-17) Rice still refused to re-

linquish his claim. (EOR 26 at 747-48 ¶¶ 18-21; EOR 27 at 771 ¶ 16)

Based on Rice's position, Judge Rymer requested counsel for the RTC to consider a settlement structure under which the RTC would receive $25 million to settle its claims against the RTC Action defendants other than Rice, would remain exposed to Rice's claims for compensation, but would retain its claims against Rice. (EOR 31 at 1657 ¶ 7) After the D&O Insurers indicated that they would still be willing to fund the settlement on those terms, RTC counsel agreed to recommend them to the RTC. (*Id.* at 1657-68 ¶ 8)

On March 9, 1993, counsel for all the other individual defendants, including Modzelewski, agreed to recommend that their respective clients enter into an agreement to settle and dismiss the Class Actions, the Derivative Action, and their Compensation Suits and to settle and dismiss the RTC Action as to all defendants except Rice, at that time the only Non-Settlor. (EOR 26 at 746 ¶ 17)

On March 10, 1993, Judge Rymer met with Rice and his counsel in an attempt to achieve a full and complete settlement of the RTC Action. (*Id.* at 747-48 ¶ 20) For nearly two hours, Judge Rymer discussed with Rice his reasons for not agreeing to relinquish his claims against the RTC (*Id.*) Judge Rymer then emphasized the potential risks Rice faced if he did not settle, and she explained why she felt Rice should consider participating in the settlement. (*Id.*) Rice nevertheless declined to release his claims against the RTC unless he received cash compensation for them, and thus, he elected not to settle on those terms. (EOR 25 at 732 ¶ 4)

Settlement Papers Drafted.—Counsel for the settling parties and counsel for the D&O Insurers prepared a Memorandum of Understanding ("MOU") memorializing the main terms of the global settlement that they had agreed to recommend to their clients. (EOR 26 at 750-51 ¶ 25) The MOU was executed on or about March 19, 1993. (*Id.*). In early April 1993, counsel for

Modzelewski advised Judge Rymer in writing of Modzelewski's agreement to dismiss his Compensation Suit with prejudice and thus participate in the settlement, and his counsel executed the MOU. (Pet. A13, A20) Following the execution of the MOU, counsel for the Settling Parties drafted the Stipulation of Settlement and exhibits. (EOR 30 at 1527 ¶ 6, 1533-1654)[6]

"More" for Rice Is Discussed; Modzelewski Backs Out. —Prior to the settling parties' execution of the Stipulation, counsel for the RTC and counsel for Rice had continued discussions concerning a possible settlement of the litigation between their clients. (EOR 26 at 755-56 ¶¶ 35-38) During these negotiations, counsel for the RTC stated that he was prepared to recommend that the RTC attempt to achieve a completely global settlement (Modzelewski being on board at this time) by paying to Rice a set amount of consideration in the form of MeraBank receivership certificates to settle Rice's Compensation Suit. (EOR 31 at 1658 ¶ 11; EOR 26 at 756 ¶ 37) According to Rosen, Rice's counsel, there were increased offers of receivership certificates by the RTC's counsel and counteroffers by Rice at this time, as the District Court found. (EOR 26 at 756 ¶¶ 37-38; Pet. A20) The settlement negotiations between counsel for the RTC and counsel for Rice terminated without a settlement on September 23, 1993, when counsel for Modzelewski told Judge Rymer that Modzelewski was withdrawing from the settlement.[7] (EOR 26 at 756 ¶ 38; Pet. A13, A20)

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[6] Judge Rymer also conducted further settlement proceedings to finalize the settlement details. (EOR 30 at 1533-1654) Counsel for the Non-Settlors participated in these additional settlement proceedings and received copies of the draft and final versions of the Stipulation and exhibits. (*Id.*; Pet. A13-14)

[7] Judge Rymer specifically concluded that, throughout the settlement proceedings, the objective was to achieve a global settlement, and that "that objective was ultimately not achieved because the Nonsettling RTC Defendants concluded that their individual claims

Terms of the Global Settlement Stipulation.—The settling entities, including 42 settling defendants, executed the Stipulation as of November 24, 1993. (EOR 31 at 1658 ¶ 9) The Stipulation provides for payment of the aggregate principal amount of $61.625 million in respect of the Class Actions, the Derivative Action, and the RTC Action. (EOR 4 at 380-84 ¶¶ 3.1.3.4, 402-10 ¶¶ 7.3-7.5) Pinnacle West contributed $5.75 million to the settlement, and two of Pinnacle West's D&O Insurers contributed the remaining $55.875 million to the settlement. (*Id.* at 380-84 ¶¶ 3.1-3.4) A total of $34 million has been allocated to the settlement of the Class Actions, and the balance of $27.625 million has been deposited in a separate account available to the RTC Action and the Derivative Action. (*Id.*; Pet. A23-24) Of this latter sum, the principal amount of $25 million was allocated to the partial settlement of the RTC Action. (EOR 4 at 384-86 ¶ 3.3(b), 402-05 ¶ 7.3)

The Final Settlement Hearing.—On December 29, 1993, Judge Rymer conducted a final settlement hearing, and entered an order consolidating the Class Actions, the Derivative Action, the RTC Action, and the Compensation Suits (other than those filed by the Non-Settlors) pursuant to Fed. R. Civ. P. 42(a) for all purposes, including the implementation of the settlement. (EOR 32 at 1668-71) Judge Rymer approved the Stipulation and entered orders and final judgments dismissing the six settling directors' Compensation Suits, the Class Actions, and the Derivative Action as to all defendants, including Rice.[8] (EOR 33-34; EOR 40 at 1782-83, CR 324-29) In addition, Judge Rymer approved the partial settlement of the RTC Action, directed the entry of a final, immedi-

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for affirmative relief against the RTC were worth more than the RTC was willing to give up, and the RTC concluded the opposite . . . ." (Pet. A21-22)

[8] Modzelewski was not a defendant in the Class Actions or Derivative Action.

ately appealable judgment pursuant to Fed. R. Civ. P. 54(b), dismissing all claims asserted against all parties except the Non-Settlors, and entered an order barring the Non-Settlors from asserting certain claims by way of contribution or noncontractual[9] indemnity against the settling defendants in the RTC Action and Pinnacle West (the "bar order"). (EOR 35-36)

Proportionate Share Protection Granted.—The bar order barred the Non-Settlors from prosecuting any contribution or indemnification claims (other than those based on express contracts) against the parties participating in the settlement, including Pinnacle West. The Non-Settlors were, by the order, given the benefit of what the District Court called the "proportional rule," later to be applied by this Court in admiralty in *McDermott, Inc.* v. *AmClyde and River Don Castings, Ltd.*, 114 S. Ct. 1461 (1994) ("*AmClyde*").[10] Under that rule as applied here, any judgment "that the RTC may eventually be awarded against any Non-Settling RTC Defendants, or any other entities or persons, who are jointly and severally liable in tort to the RTC as joint tortfeasors with any or all of the RTC Settling Defendants, Mary C. Leonard[11] or Pinnacle West shall be reduced pursuant to the proportional rule judgment reduction method." (EOR 36 at 1692-93, ¶ 5)

The Court's Findings.—In approving the Stipulation and entering the bar order, Judge Rymer specifically concluded that there was no basis for the Non-Settlors to contend that the settlement was intended to injure their interests, or was structured to deprive the Non-Settlors of

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[9] The exception was, more precisely, for "claims based upon a specific written agreement of indemnity." (EOR 36 at 1692)

[10] In *AmClyde*, this Court called this method the "proportionate share" approach. 114 S. Ct. at 1466 and n.9. We will adopt this Court's terminology herein.

[11] Ms. Leonard was the ex-wife of a MeraBank director.

insurance coverage for the claims asserted by the RTC.[12] (Pet. A10-11, A21, A23-24) Judge Rymer thereafter entered findings of fact and conclusions of law determining, among other things, that the settlement of the Class Actions, the Derivative Action, the six of the Compensation Suits, and the partial settlement of the RTC Action were "inextricably interrelated." (Pet. A17) Judge Rymer further found that the global settlement was non-collusive and made in good faith and that the settlement consideration to be paid to the RTC was substantial, fair, and reasonable. (Pet. A24, A28-29, A43-46)

Judge Rymer specifically found that Pinnacle West was entitled to the protections afforded by the bar order. In determining that the settling defendants in the RTC Action and Pinnacle West were entitled to protection against the expense and burden of further claims and litigation pursuant to the bar order, Judge Rymer specifically found that "Pinnacle West has substantially facilitated and contributed to the settlement of these consolidated actions . . .", that it was a "critical party to the overall settlement of the consolidated actions," and that the global settlement "would not have occurred without Pinnacle West's contribution . . . ." (Pet. A17-18, A34) Judge Rymer also found that Pinnacle West contributed to the settlement by, among other things, funding the premium expenses for the D&O insurance policies, contributing $5.75 million to the settlement, and authorizing the payment made by the D&O insurers to be used, in part, to fund the settlement of the RTC Action. (Pet. A17-19)

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[12] Judge Rymer noted that Rice, in particular, benefited from the settlement, because at no personal expense he was being dismissed from the Class Actions and the Derivative Action in which he faced potential personal liability for substantial damages, including claims that were asserted solely against him in the Derivative Action for alleged securities fraud in connection with his sale of MeraBank stock. (Pet. A45)

The Court of Appeals Affirms.—The Non-Settlors appealed to the Court of Appeals.[13] That court affirmed unanimously. While noting that the case "involves a complex web of parties and lawsuits," the court found that, as to the issues raised by the Non-Settlors, "analysis is relatively straightforward." (Pet. B12) The Non-Settlors' claim that the settlement was not reached in good faith and unfairly prejudiced them was rejected, the court finding nothing in the record "that indicates the district court abused its discretion in finding the settling parties reached their agreement in good faith." (Pet. B13) The court also held that there was no evidence that the Non-Settlors were singled out for disparate treatment. (Pet. B13-14) The court commented that while the compensation claims of the two Non-Settlors were potentially more valuable than those of the individuals who settled, the worth of the claims was speculative, and that since the Non-Settlors "were among the highest ranking officers at Merabank, and therefore potentially subject to the greatest liability, they may have benefited more from the settlement than their settling counterparts, had they chosen to participate." (Pet. B14)[14]

The court also relied upon the fact that the District Court adopted the proportionate share rule, which limited any damage award which might be made against the Non-Settlors in the RTC Action by giving them a credit for the proportionate share of any fault of the settling entities (including Pinnacle West and the individuals) in causing the damage to the Receivership estate. (Pet.

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[13] Their appeals were from three judgments: (1) the judgment dismissing the Class Actions; (2) the judgment dismissing the Derivative Action; and (3) the judgment dismissing the claims asserted against the settling defendants in the RTC Action and imposing the bar order. (EOR 33-35)

[14] The court also commented that they derived benefit from the Settlement Agreement; Rice was dismissed from the Class Actions and Derivative Action, which sought substantial personal damages from him, at no personal expense. (Pet. B14 n.5)

B15) Thus, the Non-Settlors were not prejudiced since they were "left in the same position they would have been in if the other parties had not settled." The court accordingly upheld the "settlement process and result" as fair. (Pet. B16-17)

Finally, the court rejected two challenges by the Non-Settlors to the bar order. It found the inclusion of Pinnacle West under the bar order to be within the District Court's discretion since Pinnacle West was a critical participant in and contributor to the overall settlement, and in the light of the fact that the court applied the proportionate share offset rule. (Pet. B17-18) It also, referring with agreement to the conclusions of a number of other federal courts, rejected the proposition that a bar order upon a partial settlement could be made effective as against contribution claims but not against claims for noncontractual indemnification. It thus found it within the District Court's discretion to have included "non-contractual indemnity claims against the settling parties" as well as claims for contribution. (Pet. B18-19)[15]

Rice's Compensation Suit remains pending in the District Court,[16] as does the RTC Action to the extent it seeks recovery from the Non-Settlors.

REASONS FOR DENYING THE WRIT

The Non-Settlors urged before the Court of Appeals that the settlement unfairly prejudiced their interests and that the District Court should not have approved it. They repeat those arguments, under various rubrics and guises, before this Court. But the settlement, in which

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[15] The Non-Settlors' petition for rehearing and their suggestion for rehearing *en banc* were denied, no Judge of the Court of Appeals supporting either. (Pet. C2)

[16] As noted above, a summary judgment on the merits against Modzelewski in his Compensation Suit was affirmed by the Court of Appeals subsequent to the District Court's approval of the settlement agreement at issue in this case. *See* n.4, p. 6, above.

they were invited to participate on at least the same basis as the 42 other, settling defendants, simply left them where they would have stood had no party settled and the cases continued.[17] Under the "proportionate share" rule, subsequently endorsed in admiralty cases by this Court in *AmClyde*, to the extent that the Non-Settlors may be held liable to the RTC as Receiver in the ongoing litigation against them, they will be entitled to have the judgment reduced proportionately to reflect the relative degree of fault of the settling defendants—thereby obtaining the same benefits as they would have obtained from the equitable doctrines of contribution and indemnification. This approach is quite different from the "*pro tanto*" method employed in some cases, in which only a dollar-for-dollar credit for the settlement is made available against any judgment entered against the nonsettling defendants. *See AmClyde*, 114 S. Ct. at 1465-69. The cases principally relied on by the Non-Settlors before the Court of Appeals and in this Court involve settlements on a "*pro tanto*" offset basis.[18]

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[17] In fact, Rice was left in a better position; the Class Actions and the Derivative Action, in which he was a defendant, were completely dismissed as to all parties without any contribution whatsoever from him. Also, both Non-Settlors were benefited by the fact that the "proportionate share" bar order relieves them from the risk of the insolvency or other inability to respond of the other defendants in the case of a suit for contribution or equitable indemnification against them to the extent that such rights may otherwise have been available to them under applicable law. *See* n.29, p. 25, below.

[18] The principal such cases are *FDIC* v. *Geldermann, Inc.*, 975 F.2d 695 (10th Cir. 1992), and *In re NBW Commercial Paper Litig.*, 807 F. Supp. 801 (D.D.C. 1992). As this Court pointed out in *AmClyde*, the *"pro tanto"* method makes the amount paid in settlement by the original settling parties extremely important to the rights of the nonsettling parties, since they are barred from recovery over against the settling parties but may take credit against any judgment rendered against them only for the amount, on a dollar-for-dollar basis, paid by the settling parties. In the "proportionate share" rule, the amount paid in settlement by the

In this Court, the Non-Settlors urge: (1) That regardless of how close factually a nonparty may be connected with a particular litigation and settlement—such as by being a defendant in all but one of a number of cases settled on a consolidated basis; having contributed cash and having paid the premiums on insurance which collectively funded the entire cash cost of the settlement of all the consolidated cases; having appeared before the court in connection with the settlement proceedings as fully as if a party to all cases; having signed a tolling agreement to avoid being joined as a defendant in the only consolidated case in which it could have been a defendant but was not—there is still an absolute jurisdictional bar against a nonparty's receiving the benefit of the bar order traditional in partial settlements. (Pet. 13-19)[19] (2) When the RTC makes negotiation demands at the settlement table from a defendant, the party from whom the demands are made is entitled to the same protections as it would have at a criminal trial, including "notice, confrontation, jury trial, the requirement of proof beyond a reason-

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original settling parties is not of relevance to the nonsettling defendants. *See AmClyde*, 114 S. Ct. at 1463-67, 1469.

[19] Federal courts routinely approve partial settlements conditioned upon the entry of judicial bar orders. *See, e.g., AmClyde*, 114 S. Ct. at 1467; *In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020 (2d Cir. 1992); *In re U.S. Oil and Gas Litig.*, 967 F.2d 489 (11th Cir. 1992); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155 (4th Cir. 1991); *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990); *McDonald* v. *Union Carbide Corp.*, 734 F.2d 182 (5th Cir. 1984) (*per curiam*). The courts recognize that, without such bar orders, it would be difficult, if not impossible, to obtain partial settlements in multiparty cases where, as here, one or more of the defendants refuses to settle. *See, e.g., In re Masters Mates & Pilots*, 957 F.2d at 1028; *In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987), *quoted with approval in Franklin* v. *Kaypro Corp.*, 884 F.2d at 1229 ("Anyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented.").

able doubt and compulsory process" (Pet. 22-23) and that the RTC's making of a demand at the settlement table must be governed by the same statutory standards as those necessary in order to obtain an attachment or injunction. (Pet. 21-22) (3) That the Court of Appeals improperly applied federal law rather than Arizona law to certain matters concerning the entry of the bar order, although (a) the Court of Appeals did not say it was applying Federal law, (b) the District Court considered Arizona law in approving the settlement, (c) the Respondents cited Arizona cases to the Court of Appeals in support of the District Court's rulings on these matters, (d) Arizona courts have held that there are no noncontractual rights of indemnity between joint tortfeasors, and (e) in their Petition in this Court the Non-Settlors point to no Arizona authority contrary to the decision of the Court of Appeals and indeed cite no Arizona case law or statutes whatsoever. (Pet. 25-27)

None of these points warrants the exercise of this Court's reviewing authority and there is no conflict between the Circuits.

1. *The Jurisdiction of the District Court to Approve the Settlement, including the Bar Order.*—Apart from the six Compensation Suits which were dropped, Pinnacle West was a party to each and every one of the consolidated cases covered by the global settlement, except one, the RTC Action; as to that, it and the RTC had entered into a tolling agreement,[20] and the addition of Pinnacle West as a defendant would not have (as would the addition of a non-diverse party in a diversity suit) ousted the District Court from jurisdiction. Pinnacle West was subject to the processes of the District Court in Arizona,

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[20] The Non-Settlors conceded before the court below, as Judge Rymer indeed had found, that the RTC "would have named Pinnacle West [as a defendant in the RTC Action], but for the tolling agreement's suspending the statute of limitations." (Appellants' Br. 27-28; Pet. A18-19)

being an Arizona corporation. Pinnacle West and insurers under policies for which Pinnacle West had paid the premiums contributed all of the cash portion of the settlement. Pinnacle West appeared repeatedly before the District Court in the consolidated settlement proceedings and executed the settlement papers filed with the court. The consolidated cases, in all of which but one (apart from the Compensation Suits) Pinnacle West was a party defendant, all involved the financial difficulties that MeraBank found itself in during the late 1980s. The contention that entering a bar order in Pinnacle West's favor went beyond the jurisdiction of the District Court—which held that Pinnacle West was a "critical party to the overall settlement of the consolidated actions" and that settlement "would not have occurred without Pinnacle West's contributions"—is thus absurd and exalts form over substance; no serious argument is made to support it. *Kokkonen* v. *Guardian Life Ins. Co.*, 114 S. Ct. 1673 (1994), the Non-Settlors' principal reliance (Pet 13-14), is clearly not pertinent here. It simply held that where a federal court suit was settled through a private agreement followed by a dismissal with prejudice, and where the District Court had neither entered the private agreement as part of a consent decree or reserved jurisdiction over the performance of the agreement, a suit to enforce the settlement agreement could not be maintained in federal court without a fresh jurisdictional basis. *Kokkonen*, 114 S. Ct. at 1677. The present case does not involve a suit to enforce a settlement agreement, private or court-sanctioned, but rather the issue whether it was appropriate for a court to approve a consolidated settlement agreement that all of the parties to the consolidated cases, except the Non-Settlors, agreed upon in a case where all the parties to the settlement were before the court.

Not only is there no jurisdictional stricture against barring cross-claims against a nonparty that contributes to a settlement, but the District Court's jurisdiction and discretion were properly exercised here to enter a bar

order in favor of Pinnacle West, a principal contributor to the settlement, as the District Court's extensive findings (pages 11, 13, above; Pet. A17-19) make plain.

The decision in *FDIC* v. *Geldermann, Inc.*, 975 F.2d 695 (10th Cir. 1992), rejecting a particular settlement with a bar order in favor of nonparties, principally relied on by the Non-Settlors below and in this Court, is clearly distinguishable, as the Court of Appeals here held. (Pet. B17-18) *Geldermann* involved two suits by the FDIC as Receiver which while involving the same receivership estate were otherwise "unrelated." (975 F.2d at 696) There was no overlap between the defendants or claims in lawsuit "A" and lawsuit "B," but the defendants in lawsuit "A" had potential claims for contribution and indemnification against the persons who were defendants in lawsuit "B." The FDIC entered into a settlement with the defendants in lawsuit "B" and, as additional consideration to those defendants, agreed that a bar order precluding any claims for contribution and indemnification against them by the lawsuit "A" defendants was to be entered in lawsuit "A." This was to be done through the entry of an injunction in lawsuit "A" at the instance of the FDIC. (*Id.* at 696-97) The *"pro tanto"* judgment-sharing rule was to be employed; and the settlement agreement, and the order of the court entering the injunction in lawsuit "A," provided that only a stipulated fixed-dollar portion of the amount paid in settlement by the defendants in lawsuit "B" would be creditable against any judgment obtained by the FDIC against the defendants in lawsuit "A." That amount was determined purely by negotiation between the FDIC and the defendants in lawsuit "B." The Tenth Circuit, not unexpectedly, found that the FDIC was not the real party in interest to seek the injunction in lawsuit "A" and that the rights of the defendants in lawsuit "A" had been improperly bargained away by the FDIC in the settlement with the defendants in lawsuit "B." (*Id.* at 697-98) The record and the Tenth Circuit's discussion of it, illuminating an obviously

unfair and unilateral settlement, a lack of connection between the two cases, and an allocation of an arbitrary portion of the amount paid in settlement as a credit against any judgment obtained against the defendants in lawsuit "A," compounded by the use of the *pro tanto* method rather than the proportionate judgment method, clearly distinguish the outcome in the *Geldermann* case from the present one.[21]

2. *The Alleged Procedural Defects in the Settlement.*— The Non-Settlors contend (Pet. 19-24) that there were procedural defects in the settlement process, under the Due Process Clause (presumably of the Fifth Amendment) and under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). These claims are without substance. The first claim (Pet. 19-20) is that Pinnacle West was not a party defendant to all of the consolidated lawsuits, and "as a matter of due process the court cannot adjudicate the rights of entities whose claims are not before the court." (Pet. 20) But the Non-Settlors were before the court. Moreover, apart from the six dismissed Compensation Suits, Pinnacle West was a party defendant in all of the consolidated cases except one; and both it, and the Non-Settlors, participated fully in the settlement discussions, the extended series of settlement conferences and hearings before the District Court, and in the final controversy and hearings as to whether the settlement agreement should be approved.[22] The District Court made the same sort of findings as to the settlement which would have been appropriate had Pinnacle West been a party to all of the consolidated lawsuits, and

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[21] The ruling in the *Geldermann* case was not "jurisdictional"; the Court's disposition of the appeal was not an order holding that the District Court had no jurisdiction but a remand of the injunctive bar order to it for further consideration, with a pointed suggestion that use of the *"pro tanto"* rule might not be appropriate. (975 F.2d at 699-700)

[22] The extensive procedural course of the negotiations is set forth in the Statement, pp. 6-13, above.

additional findings besides. Because one hundred percent of the cash contributed toward the consolidated settlement was paid by Pinnacle West and its insurers, it is hard to say that the settlement would or could have been any fairer had Pinnacle West been added as a party defendant to the RTC Action. The argument of the Non-Settlors here again exalts form above substance. The Non-Settlors were not deprived of any procedural right under the Due Process Clause.

Next, it is contended that if the RTC makes a demand that as part of a settlement a party give up a property right, such as a claim for compensation (an argument which would seem to also cover a demand for the payment of money) under FIRREA the demand must be subject to the same protections as would obtain in the case of the RTC's seeking an attachment or an injunction. (Pet. 20-24) It is irrational to say that a demand made in a settlement negotiation amounts to a "penalty," an "injunction" or an "attachment," as the Non-Settlors claim. (Pet. 21) The Non-Settlors were offered the same settlement terms as each of the other individual defendants.[23] While the compensation claims which they were asked to give up were, as claimed, larger than those of the other defendants, their larger responsibility and longer tenure might well be taken as an indication of potentially greater proportionate responsibility for the claims in connection with MeraBank's failure on which the RTC was suing, as the Court of Appeals observed.[24] (Pet. B13-14) Indeed, while the settlement was in fact offered on proportionate terms, that does not seem to be a requirement of due process or fair procedure (just as the argument

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[23] Indeed, there were negotiations by the RTC's counsel toward giving them better terms, but those proved unfruitful. *See* pp. 8, 10, above.

[24] The RTC asserted defenses against all the Compensation Suits and won its case against Modzelewski. The court below characterized Rice's claim and those of the others as "speculative." Pet. B13 & n.4.

made by the Non-Settlors does not seem to turn on whether the demand that they give up their compensation claim was proportionate to the similar demand on others or not). In any event, the short answer is that if the Non-Settlors did not like the RTC's demand, they were free to reject it—as they finally did. That they did not like the settlement is not a basis for overturning the settlement agreed to by the other 42 defendants. Neither the settlement nor the bar order affected the continuing rights of the Non-Settlors—they continued to prosecute their claims against the RTC for their unpaid salary continuation payments;[25] the RTC continues to assert its defenses; and the RTC continues to prosecute its affirmative claims against them. If they are held liable to the RTC, the judgment against them will be reduced equitably by the amount of the settling entities' proportionate fault, as it would had their claims of contribution and indemnification not been barred.[26]

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[25] As noted above, n.4, p. 6, Modzelewski's claim came to an end shortly after the settlement when the Court of Appeals affirmed a summary judgment against him on the merits of his claim. *See* Pet. B.12 n.3.

[26] As the District Court observed (Pet. A39 n.6), Arizona has abolished joint and several liability, both for torts involving personal and physical damage and those involving economic damage, with a few exceptions, none of which the District Court perceived as pertinent to the claims in the RTC Action. "Relative fault" took its place. (*Id.*; *see* Ariz. Rev. Stat. Ann. § 12-2506(A), (D); § 12-2501(G)). While Ariz. Rev. Stat. Ann. § 12-2504(1) provides for the use of the *"pro tanto"* method in the case of a partial settlement, the District Court observed, based on Arizona case law, that § 12-2504(1), enacted prior to the Act abolishing joint and several liability, did not apply to cases where joint and several liability does not exist and the regime of relative fault applies. (Pet. A39 n.6, citing *Roland* v. *Bernstein*, 828 P.2d 1237, 1238-39 (Ariz. App. 1991)). To the extent Arizona law is applicable to the RTC's claims under *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994), the Arizona law simply complements the effect of the bar order and "proportionate share" rule applied here.

3. *The "Arizona Law" contention.*—As a final point (Pet. 25-27), the Court of Appeals is said to have "improperly federalized Arizona common law on indemnity" in connection with the bar order. Yet (a) the District Court discussed Arizona law in reaching its decision to approve the settlement (Pet. A38-39, A43-44); (b) the Court of Appeals did not indicate whether it was applying federal or state law, apparently not having perceived any difference in result, since both sides briefed Arizona law;[27] and (c) the Non-Settlors have not cited any Arizona authority to this Court or made any showing to this Court that Arizona law required a different answer as to the imposition of a bar order resolving noncontractual indemnification claims[28] as well as contribution claims. The order barring noncontractual (hence "equitable") indemnification claims over against the settling parties as well as contribution claims is in accordance with holdings of a number of Courts of Appeals. *See In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 495 (11th Cir. 1992) (there is not "a shred of logic upon which [the Court] could base a principled distinction between bar orders against contribution, on the one hand, and orders against indemnity or so-called 'independent claims' on the other"); *In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1028 (2d Cir. 1992); *Associated Elec. Co-Op, Inc.* v. *Mid-America Transportation Co.*, 931 F.2d 1266, 1272 (8th Cir. 1991). No Arizona law to the contrary is brought forward by the Non-Settlors; they have neither cited any Arizona statute or case law establishing any noncontractual "equitable" right to indemnity on their part nor any Arizona law precluding a bar order from extinguishing any such supposed

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[27] *See* Appellants' Br. 32-35; Appellees' Br. 37-38.

[28] There is no basis for the statement at Pet. 10-11 that the settlement barred all indemnification claims; it only barred noncontractual indemnification claims, together with contribution claims. (*See* Pet. A37; *see* p. 12 and n.9 above)

right.[29] This point, like the other points, does not warrant this Court's attention.

* * * *

The settlement does not prejudice the rights of the Non-Settlors, leaving them no worse than where they would have been in the absence of a settlement and bar order, and in a position where they will not have to bear any greater burden as a result of any judgment against them than they would have had to bear had there been no settlement and any equitable rights of indemnification and contribution against the other defendants which they had, had not been barred. It left them in a position where they retained their compensation claims against the Receivership estate, subject to whatever defenses the Receiver had. The claims of lack of jurisdiction in the District Court, of deprivation of due process in the negotiation of the settlement, and of some undescribed neglect of pertinent Arizona case law, are meritless. None of them presents a conflict of authorities among the Circuits requiring this Court's attention.[30]

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[29] Indeed, it is well settled under Arizona law that "[g]enerally, there is no indemnity among joint tortfeasors." *Cella Barr Assocs., Inc.* v. *Cohen*, 868 P.2d 1063, 1068 (Ariz. App. 1994), citing *Shea* v. *Superior Court*, 150 Ariz. 271, 274, 723 P.2d 89, 92 (1986). Arizona courts have repeatedly stressed "[t]hat the party seeking indemnity must be free from any negligence (regardless of the nature of that negligence) contributing to the liability creating event." *Mountain States Tel. & Tel. Co.* v. *Corbin-Dykes Elec. Co.*, 559 P.2d 1067, 1069 (Ariz. App. 1976). The RTC is suing the Non-Settlors for their own alleged tortious conduct, including their own alleged acts and omissions of negligence and gross negligence. Under the proportionate share rule, the Non-Settlors cannot have any liability for the fault of any of the settling defendants, and they therefore can be held liable to the RTC only if and to the extent they are found to have engaged in their own "liability creating" conduct. Thus, the Non-Settlors cannot as a matter of Arizona law in any event have any noncontractual state-based indemnity claims against the settling defendants.

[30] The Non-Settlors, without specification, claim that the decision below conflicts with *In re San Juan Dupont Plaza Hotel Fire Litig.*,

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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45 F.3d 564, 568 (1st Cir. 1995) (Pet. 27). The entirety of that opinion, not simply the specific page cited, may be read without encountering any discussion or holding which touches on any of the issues involved in the present case.

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No. 95-358

In the Supreme Court of the United States

OCTOBER TERM, 1995

GENE E. RICE, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court exceeded its jurisdiction, in the context of approving a global settlement of ten consolidated actions, when it issued an order barring the nonsettling parties from asserting contribution and noncontractual indemnity claims against Pinnacle West Capital Corporation.

2. Whether the settlement imposed a penalty against the nonsettling parties without due process of law and in violation of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.

3. Whether, in determining the permissibility of the district court's order barring the nonsettling parties' noncontractual indemnity claims, the court of appeals appropriately considered applicable provisions of Arizona law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B19) is reported at 51 F.3d 194. The opinion of the district court (Pet. App. A1-A47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1995. A petition for rehearing was denied on June 5, 1995. Pet. App. C1-C2. The petition for a writ of certiorari was filed on August 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Gene E. Rice and Ernest F. Modzelewski are former officers and directors of MeraBank, a Federal Savings Bank (MeraBank), which failed in February, 1990. Pet. 5. Rice had been MeraBank's chairman and chief executive officer and a director of its parent company, Pinnacle West Capital Corporation (Pinnacle West); Modzelewski was MeraBank's president. *Ibid.* Along with their co-petitioner spouses, Rice and Modzelewski seek review of the court of appeals' decision affirming the district court's approval of a partial settlement of a suit brought by the Resolution Trust Corporation (RTC) against several former MeraBank officers and directors, including Rice and Modzelewski.

The partial settlement of the RTC suit was part of a larger, global settlement—achieved after almost two years of vigorous, judicially supervised negotiations—of ten consolidated lawsuits pending in the United States District Court for the District of Arizona. Those suits, which arose out of the failure of MeraBank, included two shareholder class actions (Class Actions), a shareholders' derivative action (Derivative Action), and six actions brought against the RTC by former MeraBank officers and directors who sought compensation allegedly owed them for their service at Merabank (Compensation Claims). Pet. App. B9-B10. More than forty persons joined the global settlement, including both of the relevant directors' and officers' liability insurers (D & O Insurers) and Pinnacle West, which was a named defendant in the Class Actions and a nominal defendant in the Derivative Action, and which would have been a

defendant in the RTC suit but for its execution of a tolling agreement with the RTC. *Id.* at B10, A18-A19.

Under the Stipulation of Settlement, executed on November 24, 1993, Pet. App. B10 n.2, Pinnacle West contributed $5.75 million to the settlement fund,[1] and the D & O Insurers (whose premiums were paid by Pinnacle West) contributed an additional $55.875 million, *id.* at A17-A18. Of the total, $34 million has been allocated to the settlement of the Class Actions, and the balance of $27.625 million has been deposited in a separate account to be applied toward the partial settlement of the RTC Action ($25 million) and the complete settlement of the Derivative Action ($2.625 million). *Id.* at B10 n.2.

The individual defendants made no out-of-pocket contributions to the settlement fund, but were required to give up their contested compensation claims against the RTC in exchange for full releases from personal liability. Pet. App. B11-B12. Although petitioners Rice and Modzelewski participated fully in the settlement discussions, and were offered the same terms as the other former officers and directors, they declined to join the settlement, preferring to pursue their individual compensation claims and to forego settlement on any basis that would require them to compromise those claims. *Id.* at A20.[2]

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[1] Pinnacle West had earlier paid $465,500,000 to the RTC (as receiver for Merabank) pursuant to a settlement with the Office of Thrift Supervision of claims made against Pinnacle West under a capital maintenance agreement. Pet. App. A17; Pet. 5-6.

[2] When Rice appeared to be the sole holdout, the RTC made a number of proposals to settle with him on terms more favorable than those offered to the other former officers and directors, including proposals under which Rice would have

Consummation of the settlement was made contingent on receipt of judicial approval and issuance of an order barring petitioners from pursuing against the settlors claims for contribution and/or noncontractual indemnity relating to the RTC suit. Pet. App. A2-A3.

2. On December 29, 1993, after a final settlement hearing, the district court rejected petitioners' arguments in opposition to the settlement and entered orders (i) approving the Stipulation of Settlement; (ii) dismissing the settling defendants' Compensation Claims, the Class Actions, the Derivative Action, and all of the claims asserted by the RTC (except as to petitioners); (iii) barring petitioners from asserting contribution or noncontractual indemnity claims relating to the RTC suit against the settling defendants and Pinnacle West (the bar order); and (iv) adopting the proportionate share offset rule with respect to the RTC's claims against petitioners, so as to limit petitioners' potential liability to their proportionate share of fault for the RTC's losses. Pet. App. A4-A5.

In its findings of fact and conclusions of law, the district court found that the settlement had been arrived at in good faith, and that it represented a fair and reasonable resolution of the RTC suit and the other consolidated actions. Pet. App. A28, B11. The court rejected petitioners' contentions that the settlement reflected a collusive attempt to injure

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received compensation in the form of receivership certificates. Pet. App. A20. Rice rejected those proposals, however (*ibid.*), and after Modzelewski joined Rice in his refusal to settle, the RTC discontinued its attempts to pursue an individually tailored solution, *id.* at A13, A20.

them, *id.* at A10-A11, A21-A24, observing that petitioners "were offered an opportunity to participate in the settlement on the same terms as offered to, and accepted by, co-defendant Settling Parties who are essentially similarly situated," *id.* at A19.[3]

The court also rejected petitioners' challenge to the bar order, concluding that "each of the settling RTC Defendants [wa]s entitled to protection against the expense and burden of further claims and litigation relating to the RTC Action," Pet. App. A29, and that extension of the settlement bar to Pinnacle West was appropriate "in the circumstances of this case," *id.* at A31. The court noted that, although Pinnacle West was not presently a named defendant in the RTC suit, "the RTC ha[d] indicated that [in the absence of a settlement] it would pursue claims against Pinnacle West." In addition, the court explained that the settlement of the various cases was "inextricably interrelated," *id.* at A17, and that Pinnacle West's direct contribution of $5.75 million and its authorization of the D & O Insurers' payments made Pinnacle West "a critical party to the overall settlement of the consolidated actions," without whose participation "the partial settlement in the RTC Action could not have occurred," *id.* at A34.

The court of appeals affirmed. Pet. App. B1-B19. It found nothing in the record "indicat[ing that] the

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[3] The court noted, in addition, that because it had adopted a proportionate share offset rule, petitioners were "left in the same position they would have been in if the other parties had not settled," Pet. App. A43, and that petitioner Rice would affirmatively benefit from the settlement, since, at no personal expense, he was being dismissed from the Class and Derivative Actions, in which he had substantial personal exposure, *id.* at A45.

district court abused its discretion in finding the settling parties reached their agreement in good faith," and "no evidence that the settling parties singled out the Nonsettlors for disparate treatment." *Id.* at B13. The court commented that, while the compensation claims asserted by petitioners were potentially more valuable than those of the individuals who settled (because petitioners had been more highly compensated officers), the worth of their claims was speculative.[4] In addition, the court reasoned that, since petitioners Rice and Modzelewski "were among the highest ranking officers at MeraBank, and therefore potentially subject to the greatest liability, they may have benefited more from the settlement than their settling counterparts, had they chosen to participate." *Id.* at B13-B14.

The court of appeals rejected petitioners' argument that the settlement violated their procedural rights under the Fifth Amendment and under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. The court observed that, because of the district court's use of the proportionate share offset rule, petitioners were "left in the same position they would have been in if the other parties had not settled." Pet. App. B15. They "were not prejudiced by the settlement, and therefore the RTC did not unfairly penalize

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[4] The speculative nature of petitioners' claims was demonstrated soon thereafter in *Modzelewski* v. *RTC*, 14 F.3d 1374 (1994), when the Ninth Circuit affirmed the dismissal of petitioner Modzelewski's suit against the RTC on the ground that his deferred compensation rights had not vested at the time the RTC took over MeraBank. *Id.* at 1378. The court concluded that Rice's compensation rights had vested, and remanded his claim for further adjudication. *Ibid.*

them or deprive them of a property or liberty interest." *Id.* at B17.

Further, the court concluded that the district court did not abuse its discretion by barring petitioners' contribution and noncontractual indemnity claims against the settling parties. Pet. App. B17-B19. The court found no support for petitioners' categorical assertion that a settlement bar can never apply to preclude claims against nonparties, and it affirmed the application of the bar in this case to claims against Pinnacle West, since Pinnacle West was a critical participant in, and contributor to, the overall settlement, and in light of the district court's application of the proportionate share offset rule. *Id.* at B17-B18. The court also rejected petitioners' contention that a settlement bar cannot be applied to preclude claims for noncontractual indemnity, "finding 'not a shred of logic upon which [to] base a principled distinction between bar orders against contribution, on the one hand, and orders against indemnity . . . on the other.'" *Id.* at B18-B19 (quoting *In re U.S. Oil & Gas. Litig.*, 967 F.2d 489, 495 (11th Cir. 1992)).

ARGUMENT

1. Petitioners argue (Pet. 13-19) that the district court exceeded its authority in barring the nonsettling defendants' potential contribution and noncontractual indemnity claims against Pinnacle West, because Pinnacle West was not a party in the RTC suit. That argument is without merit. There is no jurisdictional impediment to the entry of an order barring claims for contribution or indemnity against a nonparty that has fully participated in the settlement. The district court properly exercised its discretion to apply such a bar under the circumstances

of this case. The court of appeals' decision affirming the district court does not conflict with any decision of this Court or of any other court of appeals.

"There is little disagreement that contribution bars may be implemented; without them, settlement would be unlikely." *In re NBW Commercial Paper Litig.*, 807 F. Supp. 801, 810 (D.D.C. 1992); see also *In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987) ("Anyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented."). Although, like other aspects of a settlement agreement that affect the rights of third persons, application of a settlement bar is subject to scrutiny for its fairness to nonsettlors, see, *e.g.*, *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020 (2d Cir. 1992), we know of no case holding that a court is jurisdictionally incapable of precluding contribution or noncontractual indemnity claims against a settling party that was not a defendant in the underlying litigation. Petitioners provide no citation that supports that alleged jurisdictional limitation.

Nor do petitioners offer any substantive reason why a settlement bar should not apply to nonparties who have participated fully in the settlement. The settlement bar complements, and provides the justification for, the proportionate share offset rule, which limits the nonsettlors' liability in the principal suit to their share of fault in recognition of the nonsettlors' inability to recover from the settling parties in a later suit for contribution. Correspondingly, there is no unfairness in precluding the nonsettlors' rights to seek contribution when they will not be held liable in

the principal suit for more than their proportionate share of fault.[5] Having been accorded the benefits of the proportionate share offset rule (including protection against liability for damages caused by the acts or omissions of Pinnacle West), petitioners should not be permitted to disengage those benefits from the settlement bar, with which the offset rule was inextricably tied.

While repeatedly noting that Pinnacle West was not a party in the RTC suit, petitioners advance no reason why the settlement bar should not extend to Pinnacle West, which was a named defendant in the Class Actions, a nominal defendant in the Derivative Action, and would have been named as a defendant in the RTC suit "but for the tolling agreement's suspending the statute of limitations." Pet. App. A18-

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[5] In contrast, equitable indemnity provides a basis to shift the entire liability for the underlying judgment to a person with greater fault. A bar on equitable indemnity may therefore leave a nonsettling party in a worse position than it would have been in absent the settlement, even taking into account the effect of the proportionate share rule. See *NBW*, 807 F. Supp. at 810-811. That concern is not present in this case, because under Arizona law (which petitioners claim is applicable (Pet. 25-27)) "the party seeking indemnity must be free from any negligence (regardless of the nature of that negligence) contributing to the liability creating event." *Mountain States Tel. & Tel. Co.* v. *Corbin-Dykes Electric Co.*, 559 P.2d 1067, 1069 (Ariz. Ct. App. 1976). See also *Cella Barr Assocs., Inc.* v. *Cohen*, 868 P.2d 1063, 1068 (Ariz. Ct. App. 1994) ("Generally, there is no indemnity among joint tortfeasors."). Since the RTC's claims against petitioners are based upon allegations of tortious conduct, Pet. 6-7; Pet. App. A42-A43, if petitioners are found liable, they would not have any right to seek equitable indemnity from Pinnacle West even in the absence of a settlement bar.

A19. The district court had strong reasons for including Pinnacle West within the scope of the settlement bar. As the court recognized (*id.* at A17-A18), since Pinnacle West and its D & O Insurers contributed 100% of the funds for the settlement, Pinnacle West was a "critical party to the overall settlement of the consolidated actions," which would not have occurred without its participation. *Id.* at A34. And because of the district court's adoption of the proportionate share offset rule, petitioners are no worse off under the order barring claims against Pinnacle West than they would have been in the absence of the settlement. *Id.* at B15.

Kokkonen v. *Guardian Life Ins. Co. of America*, 114 S.Ct. 1673 (1994), provides no support for petitioners' claim that the district court lacked authority to include Pinnacle West within the scope of the settlement bar. In *Kokkonen*, this Court held that, when a suit had been dismissed with prejudice and the order of dismissal did not incorporate (or reserve the court's jurisdiction to enforce) the parties' settlement agreement, the district court could not entertain a later suit for breach of the settlement absent an independent basis for subject matter jurisdiction. *Id.* at 1677. This case does not involve a suit to enforce a settlement agreement, but rather a court's authority to approve a settlement and a related settlement bar in a case over which it indisputably had subject matter jurisdiction.

Nor does the court of appeals' decision in this case conflict with *FDIC* v. *Geldermann, Inc.*, 975 F.2d 695 (10th Cir. 1992). *Geldermann* involved an attempt by the FDIC to obtain an order barring the defendants in that action from seeking indemnity or contribution from various nonparties with whom the FDIC had

entered into a settlement in wholly unrelated litigation. 975 F.2d at 696. The nonparty beneficiaries for whom the FDIC sought the settlement bar in *Geldermann* were never before the court. 975 F.2d at 698-699. For that reason, the Tenth Circuit held that "the FDIC [was] not the real party in interest" to request a bar order, and, therefore, that Rule 17(a) of the Federal Rules of Civil Procedure prevented the court from addressing the FDIC's request. 975 F.2d. at 697.

Rule 17 does not support petitioners' argument in this case. That rule, which requires generally that an action be prosecuted in the name of the real party in interest, is not a limitation on jurisdiction. To the contrary, the Rule expressly anticipates that the absent beneficiary of the requested relief may ratify the request for relief and thereby give the request "the same effect as if the action had been commenced in the name of the real party in interest." Fed. R. Civ. P. 17(a). Moreover, here, unlike in *Geldermann*, the beneficiary of the bar order—Pinnacle West—was a party before the court in several of the consolidated cases, and it participated in its own right in the extensive negotiations and hearings that culminated in the settlement. There is doubt that, as the district court found, Pinnacle West "[wa]s seeking a bar order for itself." Pet. App. A33.

Geldermann is also distinguishable because the district court in that case applied a *pro tanto* offset rule, under which a nonsettling defendant is entitled to a credit only for the amount actually paid in settlement by the settling parties. 975 F.2d at 699; see *McDermott, Inc.* v. *Amclyde*, 114 S. Ct. 1461, 1465-1469 (1994). Application of a settlement bar in those circumstances raises fairness concerns not present

here, because under the *pro tanto* rule the non-settling parties may be saddled in the principal litigation with liability exceeding their share of fault. Pet. App. A33-A34.[6]

2. Petitioners argue (Pet. 19-24) that they have been denied due process under the Fifth Amendment and FIRREA. They contend (Pet. 19-20), first, that Pinnacle West was not a party defendant to all of the consolidated lawsuits, and "as a matter of due process the court cannot adjudicate the rights of entities whose claims are not before the court," Pet. 20. It is petitioners, however, that complain of a due process violation, and petitioners (along with their objections to the settlement) were indisputably before the court. Moreover, Pinnacle West (which was a party in the related Derivative and Class Actions) participated fully and openly in the settlement negotiations and the hearings, Pet. App. A18-A19, A34-A35, and was treated by the court for purposes of the settlement as if it has been a party defendant in the RTC suit.[7] Petitioners identify no procedural impediment occasioned by Pinnacle West's nonparty status.

Second, petitioners contend (Pet. 20-24) that by requiring them to relinquish their Compensation Claims as a condition to the dismissal of the RTC's claims against them, the RTC has penalized them and taken their property (*i.e.*, their legal claims) without

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[6] As the district court recognized (Pet. App. A40), application of a *pro tanto* offset rule may nonetheless be appropriate in certain contexts.

[7] The district court found that it had been "fully informed on all aspects of the RTC's claims against the Nonsettling RTC Defendants and the Nonsettling RTC Defendants' claims against the RTC *and possible claims over against other parties and nonparties*." Pet. App. A9 (emphasis added).

according them procedural due process. Before requiring a party to give up claims against the RTC as a quid pro quo for settlement, the RTC is bound (in petitioners' view) to afford them the same procedural protections that would have been due under FIRREA in an action seeking a suspension, injunction, or civil penalty, Pet. 21-22, as well as "all of the protections afforded by the Fifth and Sixth Amendments, including notice, confrontation, jury trial, the requirement of proof beyond a reasonable doubt and compulsory process," Pet. 23.

The proposition that a demand made by the government as a condition to the settlement of a civil action amounts to a "penalty" has no foundation. Such a demand has no effect on the opposing party's extant legal rights or obligations. It does not change the strength of that party's claims or defenses. Although the terms of the government's settlement offer may affect the desirability of a settlement, the government is not constitutionally required to offer settlement on any basis whatever, and the opposing party is under no legal compulsion to accept terms that it deems unfavorable.

In this case, moreover, petitioners were not singled out for adverse treatment, but were instead offered a settlement on the same terms as those accepted by the other individual defendants. And, after exercising their rights to reject that settlement offer, petitioners were left in no worse position than they would have occupied had the offer never been extended.

3. Petitioners argue that the court of appeals improperly looked to federal law rather than to the law of Arizona to analyze the permissibility of imposing a settlement bar on nonsettling defendants' indemnity claims. Pet. 25-27 (citing *O'Melveny &*

Myers v. *FDIC*, 114 S. Ct. 2048 (1994)). It is unclear whether the court of appeals applied federal or state law, but in the context of this case the question is wholly academic. Petitioners cite no Arizona authority for the proposition that a settlement bar cannot be applied to claims for noncontractual indemnity.[8] Moreover, because (in the context of the RTC's tort suit) petitioners could have no claim for equitable indemnity under Arizona law, see note 5, *supra*, the existence *vel non* of an order barring such a claim can have no impact on their substantive rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] The application of a settlement bar to claims based on equitable indemnity is, as the courts below noted (Pet. App. A35-A36, B18-B19), consistent with the majority rule under federal law. See *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 495 (11th Cir. 1992); *In re Masters Mates & Pilots*, 957 F.2d 1020, 1028 (2d Cir. 1992); *Associated Elec. Coop.* v. *Mid-America Transportation Co.*, 931 F.2d 1266, 1272 (8th Cir. 1991).

Supreme Court, U.S.
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No. 95-358

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

GENE E. RICE, et al.,
Petitioner,

v.

THE RESOLUTION TRUST CORPORATION, et al.,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

This Court already has granted certiorari and heard argument in *Matsushita Elec. Ind. Co. v. Epstein*, 64 U.S.L.W. 3 (1995) to answer the question whether a federal court may withhold full faith and credit from state court final judgment approving class action settlement on the grounds that the settlement released federal claims. This petition, as highlighted by the opposing briefs filed by the Resolution Trust Corporation ("RTC")[1] and Pinnacle West Capital Corporation ("Pinnacle") (collectively "respondents"), poses the related and equally significant question about whether a federal court can bar state law based claims against non-parties, over which the federal court had no jurisdiction, in order to facilitate the settlement of federal securities law based actions.

The RTC and Pinnacle agree that Pinnacle was a party to only six out of the seven actions covered by the settlement. [Pinnacle's Opp. at 19] The significance of Pinnacle's non-party status is that (i) the district court did not have jurisdiction to bar petitioners' state law claims against Pinnacle and (ii) the district court lacked an adequate foundation to determine whether there was a good faith settlement. More specifically, although this Court has recognized the presumption against jurisdiction, respondents have not argued against application of that presumption. Nor have respondents offered any support for the radical extension of federal power effected by approval of the

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[1] The RTC should have terminated on December 31, 1995 in accordance with the provisions of the Resolution Trust Corporation Completion Act, 12 U.S.C. Sections 1441a(m)(1) and (2). At that time, the assets and liabilities of the Resolution Trust Corporation should have been transferred to the Federal Deposit Insurance Corporation ("FDIC") and notice of substitution provided to all parties and the Court. 12 U.S.C. Section 1821a(a)(1). Since no such notice has been provided, and for the sake of consistency, petitioners shall continue to refer to the RTC rather than the FDIC.

settlement's barring indemnity claims against non-parties. Instead, respondents rest after merely trying to distinguish the cases cited by petitioners.

Finally, the RTC and Pinnacle try to blur the distinction between federal securities law applicable to the actions in which Pinnacle was a party and the state law action in which Pinnacle was not a party. In fact, the proportionate judgment rule adopted by the district court is not co-extensive with Arizona's common-law indemnification rules for passive negligence. Under Arizona law, individuals who commit "passively" breaches of duty are entitled to indemnification from actively negligent tortfeasors.

II. THE COURT SHOULD HEAR THIS PETITION BECAUSE IT HAS ALREADY GRANTED CERTIORARI ON A RELATED ISSUE.

The power of a court to bar claims that are not before it merits Supreme Court review. This Court recently heard argument in *Matsushita* about what effect to give to a state court settlement that purported to bar federal securities law claims which the state court did not have jurisdiction to hear. *Matsushita Elec. Ind. Co. v. Epstein*, *supra*. This petition asks the related and equally important question about whether a federal court can bar claims against non-parties to facilitate the settlement of federal securities law actions. For the reasons set forth in the petition, and in this reply, the Court should grant the petition and answer this important question.

III. THE DISTRICT COURT'S ORDER BARRING PETITIONERS' INDEMNITY AND CONTRIBUTION CLAIMS AGAINST A NON-PARTY WAS AN UNWARRANTED EXTENSION OF JUDICIAL POWER; THE NINTH CIRCUIT'S AFFIRMANCE OF THAT ORDER CONFLICTS WITH THE TENTH CIRCUIT.

As an initial matter, respondents do not contest that:

> Federal courts are courts of limited jurisdiction. They possess only power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co. of America, 114 S.Ct. 1673, 1675, 120 L.Ed.2d 391 (1994) (Emphasis added.)

Respondents instead attempt to factually distinguish *Kokkonen* and *FDIC v. Geldermann, Inc.*, 975 F.2d 695 (10th Cir. 1992). However, the point is that there is a presumption against jurisdiction, which respondents never even attempt to rebut. This silence is deafening when Pinnacle, the non-party corporation seeking to hide behind a claims bar in the *RTC* action, opposes the petition without addressing the issue.[2]

With regard to *Geldermann*, Pinnacle's purported distinctions from the present case actually underscore the factual

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[2] Pinnacle in its hurry to distinguish *Kokkonen* fails to correctly set forth the factual background. Pinnacle West erroneously states the settlement was "agreed upon in a case where all the parties to the settlement were before the court." [Pinnacle's Opp. at 19] As set forth previously, Pinnacle West was not a party to the RTC's lawsuit against the non-settling defendants.

similarities. First, in *Geldermann*, the Tenth Circuit rejected a bar order in favor non-parties. Id at 696. Quoting Pinnacle,

> the defendants in lawsuit "A" had potential claims for contribution and indemnification against the persons who were defendants in lawsuit "B." The FDIC entered into a settlement with the defendants in lawsuit "B" and, as additional consideration to those defendants, agreed that a bar order precluding any claims for contribution and indemnification against them by the lawsuit "A" defendants was to be entered in lawsuit "A."

[Pinnacle's Opp. at 20]

Here, petitioners have indemnification and contribution claims against Pinnacle, which is not a party to the state law based *RTC* action. Yet Pinnacle is a party to the other six actions based upon federal securities law. Critically, the degree of interrelatedness between the federal securities law actions and the RTC action cannot reasonably be determined without reference to a claim against Pinnacle in the *RTC* action. *See Epstein v. MCA, Inc.*, 50 F.3d 644, 664-666 (9th Cir.), *cert. granted*, 64 U.S.L.W. 3 (1995) (state settlement cannot bar federal securities law action when state and federal claims arose out of the same transaction but are based upon different facts).

Pinnacle also asserts as a distinguishing fact that unfairness of the *Geldermann* settlement was compounded by the use of the pro tanto rather that proportionate judgment method. [Pinnacle's Opp. at 21] Yet, as discussed *infra* in Section V, the proportionate judgment rule is not co-extensive with indemnification under Arizona law because passively negligent acts or breaches of fiduciary duty are subject to complete indemnification from active tortfeasors.

Respondents respond that Pinnacle contributed to the

settlement, paid insurance premiums and participated in the settlement negotiations so that it is "like" a party to the *RTC* action. Yet, they cannot offer a single case holding that being "like" a litigant is the equivalent of actually being a litigant for purposes of federal court jurisdiction.

The importance of requiring actually litigant status in the *RTC* action to establish jurisdiction is two-fold. First, it is the act of filing a claim against a party which gives the Court power over it. As the *Geldermann* Court noted, while parties are bound by the decisions of the district court, non-parties are not bound. Thus, non-parties have everything to gain and nothing to lose in trying to purchase petitioners' rights from the government. 975 F.2d at 698.

It is undisputed that the district court could not enter a judgment against Pinnacle and in favor of petitioners if Pinnacle were not an actual party in the *RTC* action. *Martin v. Wilks*, 490 U.S. 755, 768, 109 S.Ct. 2180, 2187, 104 L.Ed.2d 835 (1989) ("All agree that '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'").

Second, the jurisdictional requirement of naming Pinnacle in the *RTC* action serves the important policy function of providing a check on collusive settlements. Without a complaint against Pinnacle in the *RTC* action, there is no benchmark against which to measure the reasonableness of the settlement.[3] In *Geldermann*, the Tenth Circuit cautioned against

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[3] The District Court applied Arizona law, which in turned looked to California law for determination of the good faith settlement. [Pet. at A44 citing *City of Tucson v. Superior Court*, 161 Ariz. 441, 444, 778 P.2d 1337, 1340 (Ct. App. 1989), *aff'd*, 165 Ariz. 236, 798 P.2d 374 (1990) which imported California good faith settlement determination standards.] California

allowing the government to bargain away the rights of other litigants because of the danger of collusion stating:

> The FDIC obviously could enhance the attractiveness of the settlement to the Settlors if it were able to bargain away not only its claim against the Settlors, but also the claims that other entities (including entities that are not even part of the *Sevier* or *FIS* suits) might have against the Settlors.

975 F.2d at 698.[4]

Here, the danger of collusion was particularly high. The absence of any pleadings setting forth Pinnacle's potential liability in the *RTC* action prevented the district court from making a determination of good faith. Since the RTC's theories and the size of its damages against Pinnacle remained undisclosed, the district court, as a matter of law, could not determine if the settlement was reasonable. *Arthur Young & Co. v. Helmer*, 38 Cal.App.4th 1337 at 5, *modified on denial of reh'g.*, 1995 WL 627773 (1995) ("If 'there is no substantial evidence to support a critical assumption as to the nature and extent of a settling defendant's liability, then a determination of good faith based upon such assumption is an abuse of discretion.'"). Pinnacle also concedes this point, stating "it is hard to say that the settlement would or could have been any fairer had Pinnacle been added a party to the *RTC* Action."

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law requires that all parties covered by the good faith settlement are parties to the action. *Arthur Young & Co. v. Helmer*, 38 Cal.App.4th 1337 at 3, *modified on denial of reh'g.*, 1995 WL 627773 (Cal. App. 1995).

[4] The RTC also asserts *Geldermann's* reliance on Federal Rules of Civil Procedure Rule 17 is not applicable. However, to the extent that the FDIC in *Geldermann* could not be a stocking horse for a non-party, so too, the RTC cannot be a stocking horse for Pinnacle in the *RTC* action where it is not a party. Because the district court found that Pinnacle "[was seeking a bar order for itself" [Pet. at A33], Pinnacle should have been joined as a party.

[Pinnacle's Opp. at 22] Petitioners have an absolute right to know if the settlement is fair and unless the petition for certiorari is granted, no one will ever know. Thus, the Court should grant the petition to review the district court's good faith settlement determination because it is an unwarranted extension of judicial power.

IV. THE PARTIAL SETTLEMENT IMPOSED A PENALTY WITHOUT DUE PROCESS OF LAW.

Respondents also do not dispute that "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party . . . without that party's agreement." *Martin*, 490 U.S. at 768, 109 S.Ct. at 2188, *quoting Firefighters v. Cleveland*, 478 U.S. 501, 529, 106 S.Ct. 3063, 3079, 92 L.Ed.2d 405 (1986); *Geldermann*, 975 F.2d 698 n.4. In fact, neither *Martin* nor *Firefighters* are even mentioned in Respondents' briefs. Thus, the settlement and bar order violated petitioners' due process rights by depriving them of claims against Pinnacle, which are not co-extensive with the proportional judgment rule, as discussed *infra* in section V.

Nevertheless, the RTC asserts that "petitioners were not singled out for adverse treatment." [RTC's Opp. at 13] However, the government ignores the fact that its own punitive conduct has necessitated this litigation over the settlement. After all parties save petitioners, agreed to the settlement, the excess insurers' offered to pay Rice and Modzelewski's compensation claims above and beyond the amount paid out in the settlement to end this litigation. However, as the district court later noted, "[t]he RTC was unwilling to accept settlement on these terms." (R. at 1705 ¶ 15.)

The insurers had good reason to offer to pay the petitioners' pension claims on top of the settlement, because of the potential exhaustion of the insurance policies. As the district

court noted, "both the RTC and [Petitioners] maintain that substantial coverage exists with respect to the RTC claims; the insurers, of course disagree." (R. at 1705 ¶ 16) The insurers' willingness to pay petitioners' settlement claims demonstrates the substantial stakes of the coverage battle petitioners are now forced to undertake.

Finally, petitioners were offered disparate settlement terms. Their pension claims far exceeded the pension claims of the settling defendants. Moreover, none of the settling defendants were offered payment of their pension claims. [Pet. at 8-9] Forcing Mr. Rice to give up his $4.2 million pension claim after winning one appeal in a separate lawsuit is clearly punitive conduct. *Modzelewski v. RTC*, 14 F.3d 1374 (9th Cir. 1994) (holding Mr. Rice's pension benefits were vested). The RTC's efforts to force petitioners to give up their pension claims and refusal to allow the insurers to pay petitioners' pension claims amount to punishment without due process.[5]

V. THE DISTRICT COURT SHOULD HAVE EVALUATED PETITIONERS' INDEMNIFICATION CLAIMS UNDER ARIZONA LAW BECAUSE THE PROPORTIONATE JUDGMENT RULE IS NOT CO-EXTENSIVE WITH ARIZONA'S COMMON LAW INDEMNIFICATION FOR PASSIVE NEGLIGENCE.

Pinnacle concedes that the Ninth Circuit failed to distinguish between contribution and indemnification legal standards under federal securities law and garden variety state

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[5] The RTC attempts to justify its intransigence with the proposition that "the government is not constitutionally required to offer settlement on any basis whatever[.]" [RTC's Opp. at 13] Yet, to date the RTC still has not explained how any legitimate governmental interest has been further by such a punitive refusal, after its settlement terms were already met.

law negligence and breach of fiduciary duty actions brought under FIRREA. [Pinnacle's Opp. at 24] Under federal securities law, indemnity and contribution are considered essentially the same. *See In re U.S. Oil & Gas Litigation*, 967 F.2d 489, 495 (11th Cir. 1992).

In contrast, the district court in applying indemnity and contribution rules in the *RTC* action based upon Arizona law must follow state law. *O'Melveny & Myers v. FDIC*, ___ U.S.____, 114 S.Ct. 2048, 2053, 129 L.Ed.2d 67 (1994). Under Arizona law, even if petitioners are found to have breached a duty owed, they may still seek indemnification because there is a distinction between passive and active tortious conduct. *Busy Bee Buffet v. Ferrell*, 82 Ariz. 192, 310 P.2d 817, 820 (1957) (a passively negligent defendant can seek indemnification from an actively negligent defendant); *DePinto v. Landoe*, 411 F.2d 297, 301-302 (9th Cir. 1969) (a director passively breaching his fiduciary duty to a corporation can seek indemnification from other directors under Arizona law).

Respondents, of course, contest petitioners' right to seek common law indemnification from Pinnacle for any recovery the RTC obtains from petitioners on the RTC's negligence, gross negligence and breach of fiduciary claims.[6] While the RTC ignores *In re San Juan Dupont Plaza Hotel Fire Litigation*, 45 F.3d 564, (1st Cir. 1995), Pinnacle simply states the case is irrelevant. [Pinnacle's Opp. at 25-26 n.30] However, the *San Juan* Court stated one of the grounds for reversing summary judgment was the district court's failure to "discuss the asserted distinctions between the duty to indemnify and a duty to defend or their connection to the claims of contribution [under state law]." Id. at 569. Thus, at least the First Circuit requires

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[6] The RTC and Pinnacle's citation to cases stating "Generally, there is no indemnity among joint tortfeasors" clearly indicates that Arizona recognizes exceptions to the general rule. [RTC's Opp. at 9 n.5.; Pinnacle's Opp. at 25 n. 29]

disputes about the state law indemnity claims to be resolved by the trial court in the first instance.

Finally, Pinnacle's statement that "the District Court discussed Arizona law in reaching its decision to approve the settlement (Pet. at A38-39, A43-44)" is accurate as far as it goes. [Pinnacle's Opp. at 24] However, Pinnacle's reference is misleading. The Court must recognize that the District Court's discussion of Arizona law was unrelated to the contribution and indemnification issues presented. Under such circumstances, the District Court should have decided this issue before it approved a settlement barring those claims.

VI. CONCLUSION

The Court just determined in *Matsushita* that it was important for the Court to decide a settlement bar issue involving the power of a state court to bar federal securities law claims over which the state court did not have jurisdiction. This petition presents the Court an equally important settlement bar issue involving the power of a federal court to bar state law claims against non-parties over which the federal court had no jurisdiction. Based upon the arguments presented, petitioners respectfully submit that, the Court should issue a writ of certiorari reviewing the Ninth Circuit's decision.

Respectfully submitted,
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